88-1393

No. 88-

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD I. BAKER
(Counsel of Record)
WILLARD K. TOM
MICHAEL L. DENGER
WILLIS B. SNELL
W. TODD MILLER
DAVID T. SHELLEDY
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for Cross-Petitioners

Of Counsel:
DOUGLAS E. ROSENTHAL
STUART A. SALEN
COUDERT BROTHERS
1627 I Street, N.W.
Washington, D.C. 20006
(202) 775-5100

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a boycott directed at both furthering the constitutional rights of indigent criminal defendants and the economic benefit of their "striking" lawyers is beyond the scope of the antitrust laws.

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The Superior Court Trial Lawyers Association and the individual attorneys identified as Respondents in the Federal Trade Commission's Petition for a Writ of Certiorari, No. 88-1198, hereby cross-petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions below, grounds for jurisdiction, and date of the judgment to be reviewed are hereby incorporated by reference from Petitioner's petition for a writ of certiorari, which Petition was received by Cross-Petitioner on January 23, 1989. This cross-petition is filed pursuant to Rule 19.5 of this Court, and may not be granted unless the Petitioner's petition is granted.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Amendment to the Constitution and Section One of the Sherman Act, 15 U.S.C. § 1, are set forth in the Appendix to Petitioner's petition at App. 230a, and are hereby incorporated by reference.

STATEMENT

1. This case concerns restriction of Cross-Petitioners' use of a traditional form of political expression in a clearly political context, the "strike", because the expression involved elements of economic pressure and furthered the economic self-interest of the strikers.[1] The facts necessary to an understanding of this case are set forth in Respondents' Brief in Opposition filed concurrently in the matter for which this cross-petition is presented and which is hereby incorporated by reference.[2]

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[1] Parties in addition to those identified in the case caption are Cross-Petitioners Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison and Joanne D. Slaight. None of the Cross-Petitioners is a corporation.

[2] *Federal Trade Comm. v. Superior Court Trial Lawyers Ass'n.*, No. 88-1198. The citation abbreviation "Pet. App." refers to the Appendix to the FTC's petition.

REASONS FOR GRANTING THE CROSS-PETITION

The court of appeals recognizes that boycotts such as the CJA lawyers' "strike" reflect both political expression directed at the vindication of constitutional rights and economic pressure aimed at the economic benefit of the boycotters. However, by testing the legality of such boycotts by whether their participants have market power, it fashions a rule which retreats from this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[3]

The decision of the Supreme Court of Mississippi in *Claiborne*[4] leaves no doubt that the NAACP boycott sought not only the realization of constitutional rights, but also the direct economic benefit of the boycotters and other disadvantaged black residents of Claiborne County for whom they spoke. Consumer pressure on county retailers was used as a means to both ends. These ends were inseparable. Furthermore, the Mississippi decision indicates that the boycotting consumers did have economic power sufficient to force county retailers to take their demands seriously.[5] Therefore, even the *Claiborne* boycott, if reviewed under the holding of the court of appeals below, could be chilled by the spectre of a Sherman Act challenge.[6]

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[3] The Federal Trade Commission seeks a rule to the effect that even a significant political purpose and effect in a clearly political context does not remove "naked horizontal" anticompetitive conduct (Petition at 10) from *per se* Sherman Act condemnation. The inappropriateness of such a position is highlighted by its wish to be free to prosecute future *Claiborne*-type boycotts as *per se* antitrust violations, without any market power analysis.

[4] *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290 (Miss. 1980), *rev'd*, 458 U.S. 886 (1972).

[5] The decision of the Mississippi Supreme Court suggests that the Claiborne boycotters may indeed have had market power. *Id.* at 1294.

[6] The NAACP boycott was, in fact, challenged as an antitrust violation under state law. *See id.* at 1301.

The NAACP boycotters in March 1966 presented some twenty-one demands upon public officials of both Claiborne County and the City of Port Gibson which allegedly, if not met, would lead to "selective buying campaigns" and "peaceful demonstrations." Among these demands were the following:

1. "Three Negro policemen should be employed in Port Gibson . . .";
2. "Negroes should be employed in the [county] welfare office . . .";
3. "Negroes should be named to the Board of Education . . .";
4. "Official and semi-official boards and commissions, now and in the future, must include appropriate numbers of Negro citizens";
5. The "Claiborne County Hospital" and "staff" should be immediately desegregated;
6. "All stores must employ Negro clerks and cashiers";
7. "Two or more deputy sheriffs must be hired";
8. "[A] Negro County Agent [must] be employed . . .";
and
9. "[A] full time home demonstration agent [must] be employed . . . ."

393 So. 2d at 1295-96.

The court observed that:

> There was extended testimony relative to the demands for the employment of black citizens at responsible jobs, and witnesses express[ing] the view that these demands should be met even if either it meant the discharge of white employees already on these jobs or that there would be two employees doing the job requiring only one employee . . . . (*Id.* at 1300).

The demands were pursued by marches, by picketing, by the opening of a boycotters' retail store, "Our Mart" (which the Mississippi Supreme Court called "successful," *id.* at 1296), and by other activities designed to pressure white retailers and government officials to accept the boycotters' mixed political/economic goals.

The Mississippi Supreme Court recognized that this conduct could not be subjected to Mississippi's antitrust law, because that law was patterned after the Sherman Act, and because the Supreme Court in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (and companion cases), had held a similar pursuit of both political and economic goals to be beyond the scope of federal antitrust law. The antitrust count was therefore dismissed. 393 So. 2d at 1300-01.

Reversing the decision of the Mississippi Supreme Court on other grounds, this Court implicitly ratified the state court's antitrust analysis by referring to the railroad's purpose in *Noerr* "to destroy legitimate competition." *Claiborne*, 458 U.S. at 914. This Court also cited with approval the statement of Judge Stephenson in *Missiouri v. National Organization for Women, Inc.*, that:

> [The] right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of boycott.

458 U.S. at 914 n.48, quoting *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

The court of appeals below was convinced that the "strike" in this case was politically expressive conduct. (Pet. App. 46a-47a). Nevertheless, the Federal Trade Commission, supported by the court of appeals below, says that reliance upon *Claiborne* to avoid the jurisdiction of the Sherman Act is appropriate only in "situations in which the boycotters are not economic competitors promoting a parochial economic interest." (Petition at 6-7).

Such a rule would jeopardize the *Claiborne* result. *Claiborne* was an effort by the boycotters that involved both "economic coercion" and traditional political lobbying. Their goals were parochial economic interests—to obtain, among other goals, more jobs in local commerce and government, even if it meant replacing existing employees. To achieve these goals, the boycotters leveraged their economic power as consumers. Therefore, under the reasoning of the court of appeals, the *Claiborne* boycott would not be insulated from antitrust scrutiny and, absent a rule of immunity that emphasizes significant non-economic aspects of the boycott, could potentially be found to violate the antitrust laws. While the boycotters in *Claiborne* may not have had the support of all blacks, and while the potential relevant market for retail goods may be smaller, or perhaps a bit larger, than the boundaries of Claiborne County, a full market power analysis of any and all markets alleged to be relevant markets for antitrust purposes should not be required for a *Claiborne*-type boycott, or the "strike" here, to be protected by the First Amendment.

Judge Silberman, in his concurring opinion below, saw the problem with making the First Amendment protection of political expression dependent on a total absence of parochial economic interest. As he noted:

> Motivation . . . in the sense of the absence of desire for personal enrichment, cannot be the determinant of what speech is protected as political. If it were --since we all act with some attention to our economic interests—*Noerr* immunity could seldom be invoked. (Pet. App. at 59a).

It is unrealistic to expect protected political expression to be totally free of direct economic self-interest. *See Noerr*, 365 U.S. at 139. But, in distinction from Judge Silberman, this Court, we believe, would not want the legality of the admittedly political expression of a *Claiborne*-type boycott to stand or fall on a market power test.

The boycott in *Claiborne*, like the CJA lawyers' strike, had two distinctive political features not found in the medical or other traditional boycott cases of the type the FTC is so afraid of losing. (Petition at 19). First, in *Claiborne*, the boycott was to aid the constitutional rights of fundamentally unrepresented, disenfranchised blacks in a rural Mississippi county in 1966. Similarly, this case involves the Sixth Amendment rights of indigent criminal defendants and a constitutionally mandated system of criminal justice (each of which tends to be politically unpopular, *see* Opposition at 5 n.8). Second, while the protestors stood to gain personally—through greater job opportunities, in *Claiborne*, and better compensation, in this case—they also were acting as surrogates for disenfranchised persons who could not or would not act for themselves—the non-participating blacks in *Claiborne*, and the indigent criminal defendant-clients in this case.

This is the political and constitutional context which distinguishes this case and *Claiborne* from doctors boycotting health insurers' documentation requirements used to review dental reimbursement claims. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). Unlike this case, that case did not involve political activity compelling First Amendment protection.

Traditional means of expression on constitutional issues in the American political process may be forced to change substantially if the rule below applies to *Claiborne*-type boycotts as here. As a practical matter, *Noerr* and *Claiborne* could be seriously eroded. Because the CJA lawyers' "strike" should be controlled by *Noerr* and *Claiborne*, the court of appeals should have reversed the FTC's order and remanded to the Commission with an order to dismiss the action.

CONCLUSION

Accordingly, if the Petition for Writ of Certiorari is granted, this Cross-Petition for a Writ of Certiorari also should be granted.

Respectfully submitted,

DONALD I. BAKER
(Counsel of Record)
WILLARD K. TOM
MICHAEL L. DENGER
WILLIS B. SNELL
W. TODD MILLER
DAVID T. SHELLEDY
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for Cross-Petitioners

Of Counsel:
DOUGLAS E. ROSENTHAL
STUART A. SALEN
COUDERT BROTHERS
1627 I Street, N.W.
Washington, D.C. 20006
(202) 775-5100

February 22, 1989

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MAR 23 1989
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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

KEVIN J. ARQUIT
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel
(Counsel of Record)

Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2473

KAREN L. BOKAT
Attorney
Bureau of Competition

Attorneys for Petitioner Federal Trade Commission

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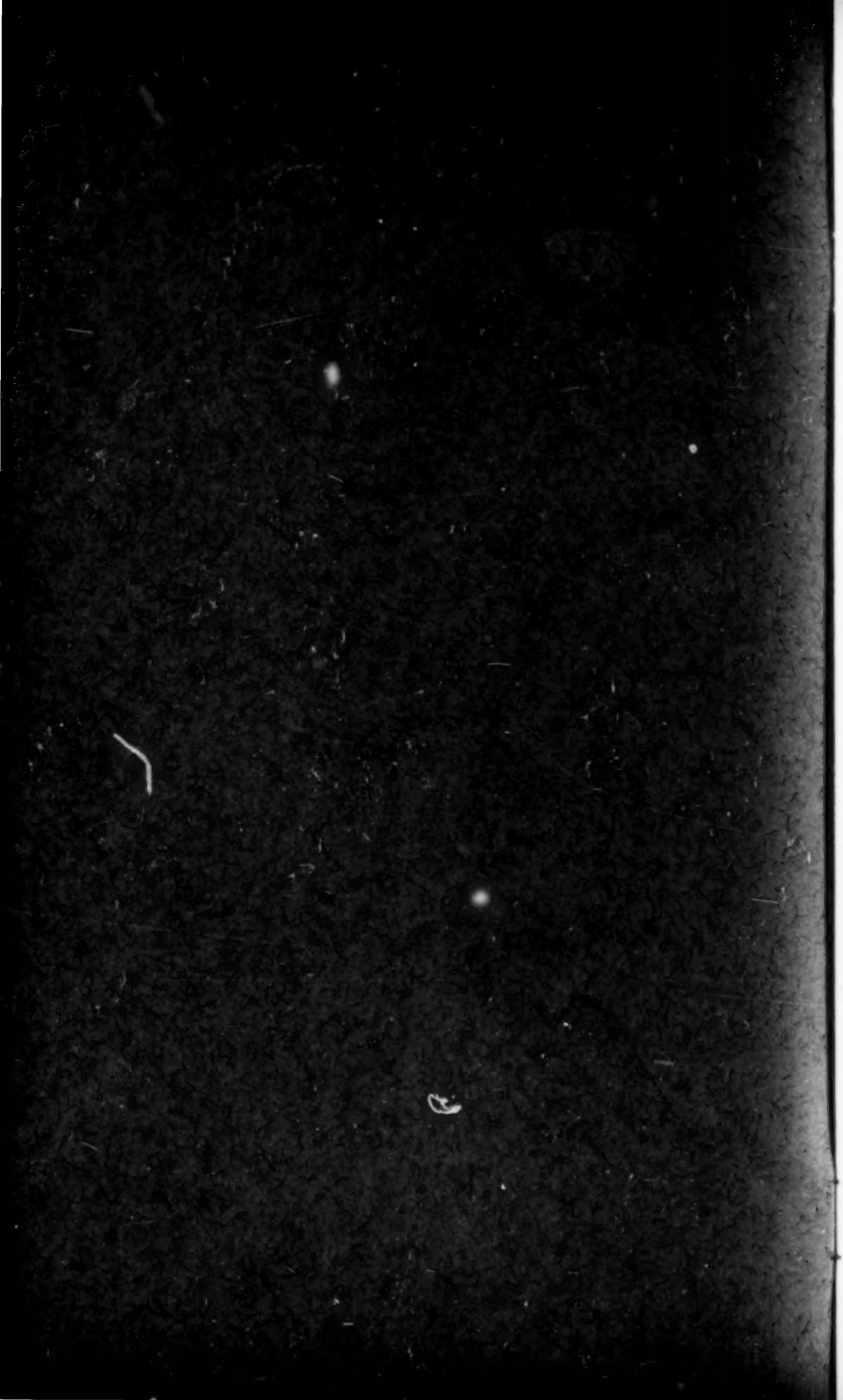

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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

Superior Court Trial Lawyers Association ("SCTLA") has filed a cross-petition for certiorari, contingent upon a grant of the petition filed by the Federal Trade Commission ("Commission") in No. 88-1198. SCTLA seeks review of the court of appeals' holding that SCTLA's boycott was not immunized from antitrust scrutiny by this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). That portion of the court of appeals' opinion addressing this issue discusses all pertinent decisions of this Court, creates no new law, and is not inconsistent with any decision of this Court or any court of appeals.[1] For

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[1] Also unlike the issue raised in No. 88-1198, as to which the administrative law judge, the Commission, and the court of appeals reached three different conclusions (see No. 88-1198 Reply Brief 1 n.1), the question SCTLA raises was resolved adversely to it by all

these reasons, the cross-petition should be denied even if the petition in No. 88-1198 is granted.

1. Most facts pertinent to SCTLA's cross-petition are set forth in the Petition for Certiorari in No. 88-1198 and the Opposition to it. SCTLA is an association of private practice attorneys who represent criminal defendants in the District of Columbia Superior Court, pursuant to provisions of the D.C. Criminal Justice Act, D.C. Code Ann. 11-2601 et seq. (1981 & 1988 Supp.) (the "CJA"). SCTLA members engaged in a lobbying campaign to persuade the D.C. City Council to increase the rates at which lawyers were compensated under the CJA. In conducting this campaign, both SCTLA members and others argued that it was in the public interest that CJA rates be increased.[2] When the lobbying campaign stalled, SCTLA members implemented an express agreement they had made that "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." (Pet. App. 3a-9a, 78a).

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three decisionmakers (see Pet. App. 32a-45a, 103a-132a, 209a-216a). ("Pet. App." denotes the Appendix to the Commission's Petition for Certiorari in No. 88-1198).

[2] Whatever its legal relevance, SCTLA's present contention that it sought to vindicate the Sixth Amendment rights of its members' clients was neither proven nor alleged below. As the court of appeals observed, SCTLA "ha[s] not argued the point," having "acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of [its members'] clients" (Pet. App. 30a). Before the Commission, SCTLA characterized the issue as involving a debate over the level of subsidized representation appropriate for indigent defendants (*id.* at 114a):

> There [was] a Chevrolet[] sort of quality . . . service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.

The court of appeals recognized that an agreement among competing businessmen to withhold their services from a buyer unless and until the buyer increased its price was "the essence of 'price-fixing' " and a "classic restraint of trade within the meaning of Section 1 of the Sherman Act" (Pet. App. 16a). By contrast, both *Claiborne Hardware* and *Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), also cited by SCTLA (Cross-Pet. 5), involved so-called consumer boycotts—concerted refusals to deal by ultimate consumers in the distribution chain, designed to achieve political and social objectives. This Court has repeatedly made clear that *Claiborne Hardware* cannot be extrapolated to classic antitrust boycotts by economic competitors.[3]

In *Claiborne Hardware* itself, this Court noted the limits of its holding by quoting a characterization of the same NAACP boycott rendered by the Fifth Circuit in a related case (458 U.S. at 915, citing *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)):

> There is no suggestion that * * * defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were

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[3] The Court has even declined to extend the "political boycott" doctrine to confer First Amendment protection upon a secondary boycott by labor union members whose *only* purpose in conducting the boycott was political—to protest Soviet foreign and military policies. See *Longshoremen* v. *Allied Internat'l, Inc.*, 456 U.S. 212, 225-227 (1982).

> directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

The Court reiterated that *Claiborne Hardware* is not to be applied to price-fixing boycotts by economic competitors last term in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). In rejecting a claim that *Claiborne Hardware* immunized the joint actions of economic competitors in connection with the formulation of product standards to be proposed for adoption by state governments, the Court observed (slip op. at 14-15 (emphasis added)):

> In [*Claiborne*] we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, *the boycott was not motivated by any desire to lessen competition or to reap economic benefits* but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and *the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. Id.* at 914-915. Here, in contrast, *petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.*

This Court's own prior statements leave no doubt that this case, in which a trade association of lawyers has en-

gaged in a direct restraint of trade to secure a "substantial increase in our hourly rate" is simply not a "*Claiborne*-type boycott[]" as SCTLA contends (Cross-Pet. 3 n.3).[4]

2. This Court's own repeated and recent statements in *Claiborne Hardware* and *Allied* about the proper scope of the "political boycott" doctrine suffice by themselves to show that there is no reason to grant the cross-petition in this case.[5] A further reason is that SCTLA has failed to identify any principled way in which the "political boy-

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[4] SCTLA finds it significant that the *Claiborne Hardware* boycotters sought, by eliminating racial discrimination against themselves, to benefit economically, through increased employment opportunities (Cross-Pet. 3, 4). In response to the same observation in *Allied*, however, the Court made clear that such a benefit is not analogous to the object of an agreement wherein economic competitors seek simply "to profit financially from a lessening of competition in the boycotted market" (*Allied*, slip op. at 15). Thus, nothing in the holding of the court of appeals or the position of the Commission could possibly create the threat of anti-trust challenge to the type of consumer boycott in *Claiborne Hardware*, as SCTLA suggests (Cross-Pet. 3 & n.6).

[5] Moreover, there is no inconsistency, as SCTLA implies (Cross-Pet. 6), between this Court's limitation of the "political boycott" doctrine to cases not involving parochial economic interests, and the protection provided by the *Noerr-Pennington* doctrine for businessmen seeking to further precisely those interests. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), established that joint lobbying activities by competitors, designed to induce the government to restrain trade to the competitors' benefit, do not become antitrust violations merely for that reason. But as *Allied* makes clear, *Noerr-Pennington* does not legalize "horizontal price agreements * * * or horizontal output restrictions" undertaken directly by competitors themselves (slip op. at 9-10). To combine *Noerr*'s protection of anticompetitively motivated lobbying by competitors with *Claiborne Hardware*'s protection for boycotts, while disregarding the limits placed by the Court on each doctrine, would seriously erode vital antitrust protections.

cott" doctrine could be expanded to protect its price-fixing boycott without opening an even more gaping loophole in the antitrust laws than that threatened by the market-power requirement at issue in No. 88-1198.

SCTLA suggests that the special treatment it seeks for the lawyers in this case can be denied most other competitors because, in seeking a price increase for their services, the lawyers were acting as "surrogates" for persons "who could not or would not act for themselves" (Cross-Pet. 7). But many businessmen who provide goods and services paid for by governments and other institutions[6] can (and do) claim to be surrogates for the individuals who will benefit from those goods and services. Most pointedly, in the Commission's experience, physicians who treat Medicaid patients are every bit as much "surrogates" for those indigent persons when they seek an increase in Medicaid reimbursement rates as the SCTLA lawyers were "surrogates" for the indigent accused. This, however, does not entitle doctors collectively to withhold their services unless their rates are raised anymore than it should entitle lawyers to do so.

SCTLA's other proposed distinction is that its boycott was allegedly designed to vindicate Sixth Amendment rights, whereas most other government suppliers cannot purport to justify demands for higher billing rates by citing a specific constitutional amendment. As earlier noted (n.2, *supra*), SCTLA did not raise this claim – much less prove it – before either the Commission or the court of appeals. Given "a record that does not support, and * * * petitioners who do not seek, a finding that the pre-boycott

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[6] The term "other institutions" is appropriate here because *Claiborne Hardware* itself involved a boycott against private businesses; the extension of its holding SCTLA wishes could not logically be limited to boycotts against the government.

rates resulted in systematic violations of the Sixth Amendment" (App. 31a-32a), this Court would have difficulty invoking such alleged violations to limit the broad erosion of antitrust protections that SCTLA's cross-petition invites.[7]

For the foregoing reasons, the cross-petition for certiorari should be denied even if the petition in No. 88-1198 is granted.

Respectfully submitted,

KEVIN J. ARQUIT
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

KAREN L. BOKAT
Attorney
Bureau of Competition

Attorneys for Petitioner Federal Trade Commission

MARCH 1989

[7] Indeed, before the court of appeals SCTLA took the opposite position, *i.e.*, that the legality of its boycott should not turn at all upon whether its members sought to vindicate the constitutional rights of their clients or sought merely to improve the quality of legal care they received ("Brief for Petitioners," No. 86-1465 (D.C. Cir., June 25, 1987) at 36-37). We agree with SCTLA's position before the court of appeals. There is no apparent reason why the antitrust obligations (or the First Amendment rights) of competitors should turn on whether they offer a service the government is expressly required to provide by the Bill of Rights or whether they merely offer services needed by the government to "provide for the common defence" or "promote the general Welfare" (Preamble, United States Constitution). If lawyers did have a constitutional right collectively to withhold their services from the government "unless we are granted a substantial increase in our hourly rate" (Pet. App. 78a), the same novel right could not be denied a great many others.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—232-762/60255

(3)

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APR 5 1989
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REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

DONALD I. BAKER
(Counsel of Record)
WILLARD K. TOM
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DAVID T. SHELLEDY

SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20004-2404
(202) 383-0100

Attorneys for
Cross-Petitioners

Of Counsel:
DOUGLAS E. ROSENTHAL
STUART A. SALEN
COUDERT BROTHERS
1627 I Street, N.W.
Washington, D.C. 20006

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FEDERAL TRADE COMMISSION,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI

The FTC's Memorandum in Opposition[1] persists in viewing this case as if it involved a simple "price-fixing boycott," entirely divorced from any political setting. It thereby misunderstands not only the nature and context of the challenged activity, but also the nature and con-

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[1] The following citation abbreviations are used in this Reply: "FTC Opp." refers to the FTC's Memorandum in Opposition; "C.A. App." refers to the Joint Appendix filed with the United States Court of Appeals for the District of Columbia Circuit; and "Pet. App." refers to the Appendix to the FTC's Petition in No. 88-1198.

text of this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), on which the FTC's Memorandum relies heavily.

Allied Tube involved a private standard-setting organization responsible for publishing "the most influential electrical code in the nation." *Id.* at 1934. Exclusion from that code had numerous consequences common to private standard setting associations:

> [P]rivate certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Id. In addition to these direct competitive effects, many state and local governments routinely adopted the Code into law with little or no change. *Id.* In an effort to exclude competition from polyvinyl electrical conduit, a number of steel producers and manufacturers of steel conduit collectively agreed to pack the upcoming annual meeting of the organization with new members "whose only function would be to vote against the . . . proposal [to allow the use of polyvinyl chloride for electrical conduit]." *Id.* at 1935.

Defendant, one of the steel conduit manufacturers, claimed immunity from antitrust liability under *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny. It argued that most of the anticompetitive impact came from the adoption of the electrical code into law by a large number of state and local governments, and that the direct anticompetitive effects were therefore incidental to a valid effort to influence government action. *Allied Tube*, 108 S. Ct. at 1938. This Court rejected that argument, observing:

> Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a 'quasi-legislative' body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a 'quasi-legislature' and given the same wide berth accorded legislative lobbying.

Id. at 1939. Although defendant had contended that the legislative impact, without more, rendered conduct political and therefore protected, this Court demurred. Rather, observing that the meeting-packing scheme could "more aptly be characterized as *commercial* activity with a political *impact*," the Court declared that "the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." *Id.* at 1941. (emphasis added). This Court recognized, however, that it was

> admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line.

Id. at 1941 n.10. For this reason, this Court cautioned that "our decision today depends on the context and nature of the activity." *Id.*

In sharp contrast to *Allied Tube*, the CJA lawyers' case is not "close to the line"; rather, the lawyers' conduct was suffused with politics from beginning to end:

- Unlike *Allied Tube*—in which "the activity at issue . . . did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process," *id.* at 1940—the CJA lawyers' "strike" took place in full public view and, in fact, was heavily dependent on, and sought to encourage, publicity to enlist political support

for their views. The lawyers actively sought media coverage—handing out press kits, organizing picket lines, and staging rallies. (Pet. App. 9a.) Several were interviewed on television and radio. (*Id.*)

- Unlike *Allied Tube*, the CJA lawyers' actions not only took place in the open political arena, but were recognized as political petitioning by the D.C. government officials who were the lawyers' putative victims as well as by seasoned observers of the D.C. political scene.[2] The Mayor met with the lawyers prior to the "strike" and made no attempt to dissuade them. Instead "there was a lot of smiling back and forth, and the Mayor said, 'You do what you have to do, and I will do what I have to do.' " (Pet. App. 187a). Indeed, he even took it upon himself to explain how an "emergency" could expedite the normal legislative process under the District's emergency legislative authority. (Pet. App. 187a.) Neither the Mayor, the Chief Judge, nor any member of the D.C. Council appeared at trial to testify that they were the victims of coercion or that the "strike" was not political. In fact, after the legislation passed, several of the Cross-Petitioners were invited to the signing ceremony and the cocktail reception that followed (C.A. App. 193-94, 240, 961), and "several [Superior Court] judges went out of their way to volunteer . . . how pleased they were at [the CJA lawyers'] success." (C.A. App. 184-87.)

- Unlike the conduct in *Allied Tube*, which took place in a private commercial context and had competitive consequences wholly apart from legislative action, the CJA lawyers' conduct was part of a lobbying effort, the *sole* purpose of which was to influence legislation, since the rate of compensation was set by statute and without legislation the lawyers could accomplish nothing.

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[2] Pet. App. 227a; C.A. App. 291-92, 309, 344-45, 347-53, 356-58, 362-67, 395, 414-16.

- Unlike *Allied Tube*, the success of the strike was critically dependent on the lawyers' ability to gain public sympathy—most obviously, because the Superior Court had the power to order any of the 100-odd striking lawyers or approximately 14,000 other active members of the D.C. Bar in private practice to take appointments.[3]

- The "strike" was designed to focus public attention on an issue of constitutional rights that was already the subject of serious public concern by those with no economic stake in the decision. (*See* Pet. App. 225a, 227a; C.A. App. 322-27 (testimony of Geoffrey C. Hazard)). As the ALJ summed it up:

> city officials (and practically every one else concerned with the criminal justice system) were convinced in 1983 that . . . the optimal economic price was inadequate to satisfy the 'political' (i.e., constitutional) requirement of effective representation. . . .

(Pet. App. 227a.)[4]

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[3] C.A. App. 127-28, 422-24. Indeed, the CJA lawyers were aware beforehand that, as one of them warned, if the court chose to exercise this power, it could break the "strike." (C.A. App. 451-52.)

[4] The FTC apparently believes that whether Cross-Petitioners were seeking to vindicate the constitutional rights of others somehow depends on whether systematic violations of those rights were proved before the FTC or the courts. *See* FTC Opp. at 2 n.2, 6-7 & n.7. But antitrust liability cannot turn on such proof. This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), imposed no requirement that systematic violations of the constitutional rights of blacks in Claiborne County, Mississippi, be proved in court as a prerequisite to political action. Moreover, the FTC's position seems to envision a vastly diminished role for the legislature in protecting constitutional rights—a world in which constitutional rights could be vindicated *only* in the courts. As the ALJ found, "every expert who had studied the problem had concluded that the pre-boycott rates . . . were woefully inadequate" to secure effective representation (Pet. App. 225a, 227a; *see also* Pet. App. 170a-178a). Such experts included the Judicial Conference of the United

- While the lawyers generally stood to gain economically from a higher rate of compensation, a major motive (and in the case of at least the individual Cross-Petitioners, the predominant motive) was to bring more and better lawyers into CJA work so as to improve the quality of CJA representation generally.[5] Indeed, Cross-Petitioner Slaight had at the time already formed an intention to leave CJA practice and had stopped taking new appointments. She participated as a leader of the "strike" because she believed "it was the right thing to do" and "felt [she] was doing more for [her] clients by supporting the increase in legislation than [she] had done for the last two and a half years [representing clients under the CJA]." [6]

States, which wrote that a failure to increase the then identical federal CJA rates "may significantly erode the quality of legal services which the Sixth Amendment . . . mandates." (C.A. App. 672.) These facts are hardly diminished by a concession by Cross-Petitioners that systematic violations were not proved; the political context of the "strike" is sufficiently established by the fact that the CJA lawyers, all the experts, and governmental officials so believed.

[5] *See* C.A. App. 156-61, 235-40, 263-67, 450, 474-77, 480-81, 497-98, 504-05. As the ALJ found:

> [W]hile CJA practice initially attracted able young attorneys, the low rates eventually drove experienced and capable CJA attorneys into more lucrative fields. This loss of attorneys with two or three years experience was described by Professor Hazard [in his testimony for Cross-Petitioners at trial] . . . as the most pernicious effect of a low rate.

(Pet. App. 176a.)

[6] C.A. App. 265-67. She subsequently decided to and did return to CJA practice after a stint at a public interest organization in New York. Two of the other three individual Cross-Petitioners, Ms. Koskoff and Mr. Perrotta, whose involvement in CJA work had been of relatively recent vintage and had grown out of long histories of public interest, political, and/or organizing work (*see* Pet. App. 148a-149a), left CJA practice shortly after the events in question, reflecting the often rapid turnover among those regularly taking CJA cases (particularly among the younger lawyers).

> Other CJA lawyers felt that higher rates would be economically detrimental to them because so many new lawyers would be drawn to taking CJA cases that it would make it difficult for lawyers that wished to make a living at CJA work to get enough cases to do so. (C.A. App. 498.)

Whether or not any single factor alone is sufficient to classify conduct as exempt from antitrust liability under the *Noerr* doctrine,[7] *Allied Tube* counsels us to consider the *entire* context and nature of the challenged activity.[8] Through this lens, the CJA lawyers' conduct was clearly a "publicity campaign directed at the general public, seeking legislation." *Allied Tube*, 108 S. Ct. at 1936, citing *Noerr*, 365 U.S. at 140-41. Such conduct

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[7] *Cf. Allied Tube*, 108 S. Ct. at 1941 n.11 ("[*A*]*t least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability" (first emphasis added)).

We emphasize that it is *antitrust* liability that is being discussed. The FTC cites *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), for its holding with respect to conduct falling within the core purpose of a Congressional enactment specifically aimed at secondary labor boycotts, without mentioning that on the same facts the application of the *antitrust* laws was *rejected*. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982).

[8] *See supra* note 7. *See also Allied Tube*, 108 S. Ct. at 1939-42 & n.10. Conversely, the FTC's attempt to make dispositive the mere fact that *Claiborne Hardware* largely involved consumers, while the CJA lawyers are suppliers, makes no sense for antitrust purposes. *Cf. Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (price-fixing by buyers held to be *per se* unlawful). Were it appropriate to decide cases on such a single factor taken in isolation, then presumably *Claiborne Hardware* would have turned on the fact that the boycotters opened a retail store in competition with the white merchants. *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1296 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982). Obviously, this Court did not so hold.

"enjoys antitrust immunity even when the campaign employs unethical and deceptive methods." *Id.* at 1937. In its heavily political orientation, the CJA lawyers' "strike" resembles the conduct of the boycotters in *Claiborne Hardware*, and should be treated accordingly.

Respectfully submitted,

DONALD I. BAKER
(Counsel of Record)
WILLARD K. TOM
MICHAEL L. DENGER
WILLIS B. SNELL
W. TODD MILLER
DAVID T. SHELLEDY

SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for
Cross-Petitioners

Of Counsel:
DOUGLAS E. ROSENTHAL
STUART A. SALEN
COUDERT BROTHERS
1627 I Street, N.W.
Washington, D.C. 20006

(5) (H)

Nos. 88-1198 and 88-1393

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

WILLIAM C. BRYSON
Acting Solicitor General

MICHAEL BOUDIN
Acting Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

KEVIN J. ARQUIT
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
KAREN G. BOKAT
Attorneys

Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2481

53 pp

QUESTIONS PRESENTED

1. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is immunized from all antitrust scrutiny by the First Amendment.

2. Whether a naked price-fixing boycott undertaken by economic competitors as part of a larger public campaign to obtain an increase in fees paid to them by the government is shielded from *per se* prohibition under the Sherman Act (15 U.S.C. 1), on the ground that the boycott constitutes expressive conduct protected by the First Amendment.

3. Whether, assuming that the *per se* rule of illegality does not apply, an antitrust plaintiff must satisfy any required showing of market power by offering proof apart from the boycotters' successful effort to restrict the output of, and increase the price for, the service they offer.

PARTIES TO THE PROCEEDINGS

Respondents and cross-petitioners, all of whom were respondents in the proceedings before the Federal Trade Commission, include the Superior Court Trial Lawyers Association, Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1198

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

No. 88-1393

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a)[1] is reported at 856 F. 2d 226. The opinion and final order of the Federal Trade Commission (Pet. App. 64a-138a) and the initial decision of the administrative law judge (Pet. App. 139a-229a) are reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals (Pet. App. 62a) was entered on August 26, 1988. A petition for rehearing

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[1] All references to "Pet. App." are to the Appendix to the petition filed in No. 88-1198.

was denied on October 25, 1988 (Pet. App. 63a). The petitions for certiorari were filed respectively on January 23, 1989 (No. 88-1198) and February 22, 1989 (No. 88-1393), and granted on April 17, 1989. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution, Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), are set forth at Pet. App. 230a.

STATEMENT

1. This case involves a successful boycott by competing private-practice attorneys, who refused to provide their services to the District of Columbia unless they were paid a higher price. The attorneys were members of respondent Superior Court Trial Lawyers Association (SCTLA), an organization of attorneys registered to accept case assignments under the Criminal Justice Act, D.C. Code Ann. §§ 11-2601 *et seq.* (1981 & Supp. 1988) (the CJA).[2] The CJA provides for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court.

CJA attorneys represent approximately 85% of all Superior Court defendants who are unable to afford counsel.[3] Any member in good standing of the D.C. Bar

[2] Respondents Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight are or were District of Columbia attorneys with practices consisting primarily of CJA assignments. All were leaders of the challenged SCTLA boycott. (Pet. App. 77a-82a, 148a-151a.)

[3] Another 8-10% (generally in more serious cases) are represented by the Public Defender Service, and the rest by third-year law students (3-5%) and *pro bono* private attorneys (under .5%) (Pet. App. 3a).

with a local address and phone number may register with the CJA office of the Public Defender Service (PDS) to receive appointments, and some 1200 attorneys have so registered. In practice, however, most appointments go to a much smaller group of about 100 CJA "regulars." These attorneys frequently seek appointment to handle CJA cases and earn most or all of their income from them. (Pet. App. 3a-4a.)

From 1970 until 1983, CJA case fees were $30 per hour for court time and $20 per hour for other time, subject to a per-case maximum of $1000 for felonies, $400 for misdemeanors, and $1000 for appeals (Pet. App. 4a). These fees were equal to the maximum rate then being paid by the federal government for representation of indigent defendants in federal court.[4] Although CJA fees had remained constant for thirteen years and participation in the CJA program was strictly voluntary, the overall quality of representation "improved markedly" during this period (*id.* at 166a, 112a n.117). Indeed, "[c]ounsel for [the SCTLA lawyers] acknowledged * * * that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients" (*id.* at 30a). Nevertheless, as early as 1975, the level of CJA fees had become a matter of concern among some members of the bar (*id.* at 5a).

Beginning in 1982, various CJA attorneys acting through the SCTLA mounted a collective lobbying effort to increase CJA compensation levels. In seeking to justify a rate increase for themselves, the lawyers argued, *inter alia*, that the public, including indigent defendants, would benefit from such an increase. In March 1983, D.C. City

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[4] The CJA (D.C. Code Ann. § 11-2604(a) (1981 & Supp. 1988)) provided for compensation of attorneys "at a rate fixed by the Joint Committee on Judicial Administration, not to exceed the hourly scale established by [the federal statute for appointed counsel, 18 U.S.C. 3006(d)(1)]." (See Pet. App. 73a n.13.)

Council Chairman David Clarke introduced a bill to increase CJA rates to $35 per hour. Although several witnesses testified in favor of the bill, the Executive Branch of the D.C. Government raised financial concerns, and as of August 1983 no legislation had been enacted. (Pet. App. 6a-7a.)

Dissatisfied with their lobbying efforts, CJA lawyers formed the "SCTLA Strike Committee," chaired by respondent Slaight, to consider other means of obtaining a fee increase (Pet. App. 7a-8a).[5] On August 11, 1983, a group of about 100 CJA lawyers met and agreed to refuse new CJA case assignments unless the D.C. Government increased CJA rates by September 6, 1983. The lawyers memorialized their agreement by posting a petition in the lawyers' lounge of the D.C. Superior Court. The petition, signed by numerous CJA attorneys, stated (*id.* at 8a):

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act.

Respondent Perrotta also sent a letter to 40 D.C. law firms that had previously indicated a willingness to do pro bono work, urging them not to accept CJA cases if a boycott ensued (*id.* at 9a).

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[5] SCTLA has often referred to the collective refusal of its members to accept new case assignments as a "strike." However, the CJA lawyers – independent entrepreneurs engaged in the private practice of law – were not D.C. government employees, nor has SCTLA ever suggested that it is a "labor organization" for purposes of the so-called "labor exemption" to the antitrust laws (Pet. App. 7a n.6). Had the CJA attorneys been D.C. government employees "on strike," they would have been subject to criminal fines and imprisonment for their conduct. See 5 U.S.C. 7311; 18 U.S.C. 1918.

When the District of Columbia government did not increase CJA reimbursement rates as the lawyers had demanded, the CJA attorneys implemented the boycott as planned. The boycott, which began on September 6, 1983, and included among its adherents nearly all CJA "regulars," had a "severe impact on the criminal justice system" (Pet. App. 9a). PDS attorneys and the few other bar members who volunteered to accept new case assignments could not keep pace with the flow of new cases. On September 15, "convinced that the system was on the brink of collapse" (*id.* at 197a), the PDS leadership wrote to Mayor Barry urging him to support legislation increasing CJA rates.[6]

The Mayor met that evening with respondents Koskoff, Perrotta, and Addison, and agreed to support Councilman Clarke's bill. On September 20, 1983, the D.C. City Council passed the bill unanimously, and on September 21, 1983, the CJA attorneys began accepting new assignments. (Pet. App. 10a-11a.) The cost of funding the CJA rate increase was estimated to be $4-5 million per year at the time of the boycott (*id.* at 206a).

2. On December 16, 1983, the Federal Trade Commission (Commission) issued a complaint alleging that the CJA lawyers' concerted refusal to accept new case assignments unless the District increased its price constituted "a conspiracy to fix prices and to conduct a boycott" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 11a, 141a).[7]

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[6] Chief Judge Moultrie also advised the mayor that the criminal justice system was approaching a crisis point. Separately, in a letter to the president of the D.C. Bar, Judge Moultrie noted that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." (Pet. App. 81a & n.47.)

[7] The "[u]nfair methods of competition" proscribed by Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), in-

The administrative law judge (ALJ) to whom the case was assigned held hearings and entered an initial decision dismissing the complaint (*id.* at 139a-229a).

The ALJ recognized that respondents expected their boycott to "have a severe impact on the District's criminal justice system," and he noted that "[t]his expectation was fully realized," in part because "there was no one to replace the CJA regulars, and makeshift measures were totally inadequate" (Pet. App. 195a-196a). The ALJ rejected respondents' claim that they lacked market power, finding that contention "contradicted by the entire record" (*id.* at 205a). The ALJ also rejected the SCTLA lawyers' claim that their conduct was a form of "political action" protected by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or "political petitioning" immune from antitrust scrutiny under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (Pet. App. 11a, 209a-216a, 228a).

The ALJ nevertheless dismissed the complaint because, in his view, "there was no harm done" (Pet. App. 227a). The ALJ surmised that "city officials" favored a fee increase for the CJA lawyers. Because a boycott was the only means to induce the City Council to effect what these "city officials" and others deemed proper public policy, the ALJ concluded that "it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects" (*id.* at 227-228a.)

The Commission unanimously reversed (Pet. App. 69a-138a). The Commission explained that "[t]he purpose of the boycott was to increase fees" and that the boycott had "succeeded in forcing the city to increase CJA fees"

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clude restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. 1. See *FTC* v. *Cement Institute*, 333 U.S. 683, 693 (1948). The Commission applied Sherman Act precedents in reaching its decision.

(*id.* at 87a-88a). "Such concerted action to raise prices," the Commission added, "has consistently been held unlawful by the courts" (*id.* at 88a). The Commission found respondents' boycott unlawful, both under a *per se* rule (*id.* at 87a-92a), and under the rule of reason (*id.* at 92a-98a).[8] Finally, the Commission held that respondents' conduct was not immunized by the First Amendment—either by the *Noerr* doctrine or by *Claiborne Hardware* (*id.* at 103a-132a). The Commission therefore entered a cease and desist order designed to prohibit SCTLA and the named individual respondents "from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process" (*id.* at 136a).

3. The court of appeals reversed the Commission's decision and remanded the case for determination whether the boycotting CJA attorneys possessed market power (Pet. App. 1a-61a). The court recognized that the SCTLA boycott was "the essence of 'price-fixing' " and a "classic restraint of trade" (*id.* at 16a) that, if "viewed through the ordinary lens of antitrust law" (*id.* at 15a), would "properly be condemned as a *per se* violation of Section 1 of the Sherman Act" (*id.* at 32a).[9] The court also rejected the

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[8] In so holding, the Commission rejected the " 'knowing wink' defense" that had appealed to the ALJ (Pet. App. 98a; see n. 40, *infra*). It stated that "[t]he record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so" (*id.* at 96a). In any event, the Commission continued, "the acquiescence or support of some members of the city government would not immunize the [SCTLA] boycott to increase prices from the antitrust laws" (*id.* at 97a).

[9] The court noted that the lawyers' price-fixing boycott was a "naked" restraint of trade, *i.e.*, it was not ancillary to any efficiency-producing integration of functions by competitors. Although judicial treatment of so-called "ancillary" restraints has varied, the court recognized that there has never been a change in the rule that such

SCTLA lawyers' reliance on the *Noerr* doctrine. The court explained that, unlike in *Noerr*, the market restraint here "resulted from private, rather than governmental, action" (*id.* at 37a) and that the lawyers "did not 'confine [themselves] to efforts to persuade,' " but rather " 'organized and orchestrated' a concerted effort to restrict the supply of services in the market place" (*id.* at 38a). The court dismissed as well the contention that SCTLA's conduct was a "political boycott" under *NAACP* v. *Claiborne Hardware Co., supra*, affirming "the FTC's finding that the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).

Although it rejected the claims of absolute First Amendment immunity for the lawyers' boycott, the court then concluded that "the SCTLA boycott did contain an element of expression warranting First Amendment protection" (Pet. App. 46a). It therefore applied the four-part test for evaluating restraints on "expressive conduct" in *United States* v. *O'Brien*, 391 U.S. 367 (1968), to determine whether application of the Sherman Act's *per se* prohibition of naked price-fixing agreements could be sustained in this case.

The court concluded that the Commission's action met the first three parts of the *O'Brien* test. Thus, the court acknowledged that the antitrust laws "lie within the constitutional power of Congress to regulate commerce"; that "the government's interest in prohibiting restraints on competition is 'important or substantial' "; and that enforcement of the antitrust laws is in no way " 'related to'

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naked horizontal restraints are illegal *per se* (Pet. App. 16a, 21a-22a). This Brief refers to "*per se*" illegality, "summary condemnation" and "condemnation without regard to market power" interchangeably to denote the circumstances in which the Sherman Act prohibits naked horizontal restraints of trade irrespective of whether market power (or actual detrimental competitive effects) can be proven.

the suppression of free expression" (Pet. App. 47a). The court held, however, that application of the *per se* rule failed the fourth *O'Brien* criterion, *i.e.*, that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [the governmental] interest [served by the statute]" (*ibid.*). The court recognized that *per se* rules are a "legitimate and substantial aid in the administration of the antitrust laws" (*id.* at 50a), but held that this "evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate" (*ibid.*).

Finally, the court of appeals held that the present record does not establish that respondents enjoyed market power, even though the boycotters comprised nearly all the attorneys who made a practice of handling CJA cases and the boycott had "dramatically reduced the supply of lawyers to the city's CJA program' " and " 'adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants' " (Pet. App. 53a-55a). The court observed that the Commission would most likely be required on remand to "examine structural evidence to determine the degree of market power, if any, that [respondents] wielded" (*id.* at 55a). The court further directed that the Commission must determine "how much market power is sufficient to justify the condemnation of an expressive boycott"—an inquiry that the court termed "a matter of first impression" (*id.* at 56a).[10]

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[10] Judge Silberman concurred in a separate opinion (Pet. App. 58a-61a). In his view, the lawfulness of respondents' boycott turned not on whether it was driven by commercial or political motives, but on whether, in light of the techniques used by the participants, the boycott succeeded through political pressure, rather than through economic coercion. He concluded that if, on remand, it is established that respondents enjoyed no market power, then "the boycott must

INTRODUCTION AND SUMMARY OF ARGUMENT

In their own words, the SCTLA lawyers "agree[d] that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act" (Pet. App. 8a). When the City did not increase the hourly rate, the lawyers implemented their agreement and collectively withheld their services until offered a higher price for them. As the court of appeals' opinion demonstrates (*id.* at 14a-22a), the lawyers' conduct was "the essence of 'price-fixing'," and "a classic restraint of trade within the meaning of Section 1 of the Sherman Act" (*id.* at 16a).[11]

Naked horizontal price-fixing agreements are unlawful *per se*, without regard to whether the conspirators can be proven to have market power (Pet. App. 20a). This Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price-fixing" (*Arizona* v. *Maricopa County Med-*

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have succeeded out of persuasion and been a political activity" (*id.* at 60a).

[11] SCTLA has at various times sought to distinguish its conduct from price-fixing by contending that the City Council, rather than the CJA lawyers, set the price for CJA services. In fact, the City Council, like any buyer, merely established the price it would *offer* for CJA services. Lawyers were not obligated to work at that price and many lawyers declined to do so (though, except when they boycotted, never in such numbers that the City was left unable to supply counsel to the indigent accused). The law prohibits agreement by sellers on the price at which they will offer to sell. Where, as in the market for indigent legal services (and as in many other markets), the buyer posts a price and invites sellers to supply it at that price, price-fixing takes precisely the form it took here: the collective refusal by sellers to offer their services unless and until the buyer increases its posted price. See *e.g.*, Pet. App. 18a-19a; *San Juan Racing Ass'n* v. *Associacion de Jinetes*, 590 F.2d 31 (1st Cir. 1979) (enjoining, as unlawful price-fixing, concerted refusal to deal by race track jockeys at rate offered by state-owned track).

ical Society, 457 U.S. 332, 347 (1982)). It has "consistently and without deviation" held naked horizontal price-fixing agreements to be unlawful "contract[s] * * * in restraint of trade" (15 U.S.C. 1), whether or not the conspirators can be proven to have market power and no matter how reasonable one may consider the prices they fix to be (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218, 221 (1940)).

"As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986), citing *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1984)). This "oldest and clearest of antitrust doctrines" (R. Bork, *The Antitrust Paradox* 67 (1978)) provides valuable certainty to those who must obey the law and makes possible effective law enforcement (*Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). And while "[*p*]*er se* rules always contain a degree of arbitrariness," the *per se* rule against naked horizontal price-fixing has uniformly been found "justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result." *United States* v. *Container Corp.*, 393 U.S. 333, 341 (1969) (Marshall, J. dissenting); see also, *e.g.*, 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 836, at 35i (1978); 7 P. Areeda, *Antitrust Law* ¶ 1509, at 408-413 (1986).

The court of appeals recognized these principles, but devised a novel and untenable exception to them. Its holding that there is no absolute immunity for price-fixing is correct, but its conclusion that special new antitrust rules should govern analysis of the price-fixing in this case should be reversed.

1. The court of appeals held correctly that nothing in the First Amendment, as construed by this Court, im-

munized SCTLA's price-fixing boycott entirely from antitrust scrutiny. The *Noerr* doctrine, by which this Court has balanced the speech and lobbying rights of competitors against the antitrust rights of the public, very clearly does not protect the conduct here. Under *Noerr*, competitors may lobby collectively to persuade the legislature to fix prices and restrict output, but may not collectively fix prices or restrict output themselves (as the SCTLA lawyers did) in order to induce the legislature to take action. Likewise inapplicable is *NAACP* v. *Claiborne Hardware Co.*, *supra*, which conferred First Amendment protection against a state tort law challenge on a "political boycott" by consumers seeking to vindicate basic rights of freedom and equality. *Claiborne Hardware* does not afford antitrust immunity to price-fixing boycotts by competitors who seek to promote their parochial economic interests by arguing that those interests coincide with the public good.

2. Although the court of appeals correctly recognized that the First Amendment does not entirely immunize the conduct here from antitrust scrutiny, it erred in holding that an otherwise *per se* unlawful price-fixing boycott that is used to further a public lobbying campaign could—under the *O'Brien* test—be condemned only upon a showing that the participants had market power. As a threshold matter, there is serious doubt whether *O'Brien* applies at all. The *per se* rule prohibited respondents' boycott—their concerted refusal to deal—and not their speech, their lobbying, or their press relations. This Court's *Noerr* and *Claiborne Hardware* decisions make ample accommodation for First Amendment expression, and there is no warrant for superimposing the *O'Brien* test on those carefully confined doctrines.

But even assuming that *O'Brien* applies, the traditional *per se* rule easily meets its standards: the rule is within the constitutional power of the Government; it furthers an

important or substantial governmental interest unrelated to the suppression of free expression; and it incidentally restricts alleged First Amendment freedoms no more than is essential to further that underlying interest. In concluding that the Sherman Act failed the latter requirement, the court of appeals failed to accord the governmental interest in *efficacious* law enforcement the weight required by *O'Brien* itself and by this Court's decisions construing *O'Brien*. The court likewise failed to consider the implications of its holding for the ability of government and other antitrust plaintiffs to enforce the antitrust laws against all those who might seek the same special treatment accorded the lawyers here.

3. The court of appeals compounded its error by imposing upon those seeking to challenge "expressive price-fixing" a new and inordinately complex standard of market power proof. Even in evaluating alleged antitrust law violations to which *per se* treatment is not applicable, proof of market power is required only where proof is lacking that a restraint has caused actual detrimental effects. The purpose of proving market power is to help the court predict whether challenged conduct (such as a corporate acquisition) has the capacity, and is likely, to cause adverse competitive effects. In this case, however, the factfinder concluded, and the court of appeals did not dispute, that the boycotting lawyers fully realized their expectation that refusing to accept new cases would severely impede the District's capacity to provide indigent counsel. The court of appeals has offered no persuasive explanation why this evidence, as in all other cases, should not satisfy any showing of market power that might be required.

ARGUMENT

I. THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT

The court of appeals unanimously agreed, as had the ALJ and the unanimous Commission before it, that nothing in the First Amendment entirely immunized the SCTLA lawyers' boycott from antitrust scrutiny. The court's holding on this point (Pet. App. 32a-45a) was correct and should be affirmed.

A. The *Noerr* Doctrine Does Not Shield the SCTLA Boycott from Scrutiny Under the Antitrust Laws.

Over the past three decades this Court has developed a body of case law—the *Noerr* doctrine[12]—to assure that the broad prohibitions of the Sherman Act do not infringe the First Amendment rights of competitors to petition their government. Application of that doctrine to the facts of this case is clear: competitors may jointly lobby the legislature to fix prices or restrict output (as the SCTLA lawyers did in early 1983), but competitors may not themselves fix prices or restrict output in an effort to induce the legislature to take favorable action (as the SCTLA lawyers did when they collectively refused to accept new cases "unless we are granted a substantial increase in our hourly rate").

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court held that a concerted effort by railroads to persuade the Pennsylvania legislature to enact legislation detrimental to the trucking industry could not be a Sherman Act violation even though (1) the purpose of the railroads in seeking the

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[12] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See also *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

legislation was to injure competition; (2) the effect of the legislation would be to injure competition; and (3) some direct injury to competition might occur as an incidental result of the publicity campaign used by the railroads to communicate their views. Noting that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint" (365 U.S. at 136), the Court observed that (*id.* at 135-137):

> [a]lthough such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint.

This Court in *Noerr* thus viewed the issue before it to be whether, in light of the First Amendment right to petition, "an expansive construction" (365 U.S. at 136) or an "extension of the Sherman Act" (*id.* at 141) should be allowed that would condemn anticompetitively motivated "agreement[s] jointly to seek legislation or law enforcement"

(*id.* at 136). The defendants in *Noerr* made no attempt to suggest that "combinations normally held violative of the Sherman Act," such as price-fixing or joint restrictions of output, could be made legal merely because they were used as a means of garnering publicity for a cause or otherwise pressuring the legislature. And this Court clearly assumed that, by its disposition of the case, it was not suddenly making such combinations legal after more than 60 years of *per se* condemnation under the Sherman Act.

The *Noerr* doctrine simply does not shield unreasonable restraints of trade that are wholly independent of any restraint *resulting from* the governmental activity sought by the defendant. In this respect it follows the common sense proposition that there is no "constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 501 (1949)). Just as no one would suggest that the SCTLA lawyers might lawfully have obstructed access to various councilmembers' offices unless those legislators agreed to speak to them or vote for their demands, so too, *Noerr* does not authorize the lawyers to engage in conduct that otherwise violates the Sherman Act to achieve the same result.

That *Noerr* does not immunize private price-fixing was reiterated by this Court only last year in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). In that case the respondent, a manufacturer of plastic conduit, brought an action under the Sherman Act, alleging that petitioner, a leading producer of steel conduit, had unreasonably restrained trade in the electrical conduit market. Respondent contended that petitioners had conspired with others to exclude respondent's product from a code of industry standards, thereby causing respondent considerable commercial damage. Petitioner

defended its conduct under *Noerr*, claiming that its efforts to exclude plastic conduit from the code were intended to affect governmental legislation. This Court rejected that defense, holding that the *Noerr* doctrine does not "immunize[] every concerted effort that is genuinely intended to influence governmental action" (slip op. 9). In language strikingly appropriate to the present case, the Court explained (*id.* at 9-10):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price-agreements as long as they wished to propose that price as an appropriate level for government ratemaking * * *. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. * * * Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

The SCTLA lawyers here took the very action that this Court cautioned against in *Allied Tube*: they declared a "boycott[] or horizontal output restriction[] * * * intended to dramatize the plight of their industry and spur legislative action" (slip op. 10). The court of appeals correctly held that *Noerr* offers no immunity for such activity.

B. The *Claiborne Hardware* Decision Does Not Shield the SCTLA Boycott From Scrutiny Under the Antitrust Laws

Noerr's clear dividing line between competitors who lobby the legislature to fix prices, and competitors who fix prices themselves in order to induce the legislature to take

action, has not been altered by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). In that case black consumers refused to deal with white merchants in order to induce government and business leaders to comply with a list of demands for equality and racial justice. The Court held that such a boycott was entitled to First Amendment protection against a state tort law challenge. The Court explained that while the government has "broad power to regulate economic activity," it does not have the right to "prohibit peaceful political activity such as that found in the boycott in this case" (*id.* at 913). The Court emphasized that the purpose of the boycott was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" (*id.* at 914).

This Court has consistently rejected efforts, such as that made by SCTLA here, to extrapolate *Claiborne Hardware*'s "political boycott" doctrine to boycotts by economic competitors seeking an economic benefit for themselves.[13] In *Claiborne Hardware* itself, the Court cited, by way of defining the limitations on its holding, the Fifth Circuit's characterization of the same boycott rendered in a related case (458 U.S. at 915, citing *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)):

> There is no suggestion that * * * defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the

[13] Indeed, the Court has even declined to extend First Amendment protection to a secondary boycott by labor union members whose *only* purpose in conducting the boycott was political—to protest Soviet foreign and military policies. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212 (1982).

> contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

In *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, *supra*, the Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking self-serving economic benefits. As the Court observed in *Allied Tube*, the boycott in *Claiborne Hardware* "was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution" and "the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market" (slip op. 14-15). The Court contrasted those facts with the situation in *Allied Tube* itself, in which "petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete" (*ibid.*).[14]

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[14] The cited language disposes of the suggestion made by SCTLA in proceedings below that there is significance to the fact that the *Claiborne Hardware* boycotters, by eliminating racial discrimination against themselves, sought personal economic benefits through increased employment opportunities. Obviously, the elimination of discrimination can be of ultimate economic advantage in many ways to the former victims of that discrimination. *Allied Tube* makes clear, however, that boycotts potentially yielding such a benefit are not analogous to agreements by which economic competitors merely seek

It is apparent, moreover, as the court of appeals observed, that expanding the limits of *Claiborne Hardware* in the manner urged by SCTLA would lead to "economic chaos" (Pet. App. 45a). Before the lower court, SCTLA maintained that immunity should be conferred upon all competitor boycotts " 'designed to dramatize public issues' " (*ibid.*) or "mobilize the political pressure necessary to enact * * * a statute" (86-1465 Pet. Br. at 32). This approach would legalize numerous price-fixing boycotts both against governments, (as the court of appeals recognized (Pet. App. 45a, 28a)), and against private parties as well.[15]

The SCTLA lawyers are hardly unique in believing that their work serves a purpose greater than providing them with a source of income. As the court of appeals recognized, "[n]o doubt most business people who sell to the government are of the opinion that they could better serve the public if only the price of their goods or services were increased" (Pet. App. 28a). And no doubt, too, the more than 20% of the gross national product that legislatures appropriate for various goods and services (*id.* at 45a & n.31) implicates innumerable "public issues" and matters of "public importance," as to which various interest groups might wish to communicate and publicize their views. Manifestly, however, vital antitrust protections would be intolerably eroded if concerted price-related refusals to deal by competitors are permitted in circumstances such as those in this case.[16]

"to profit financially from a lessening of competition in the boycotted market" (slip op. 15).

[15] *Claiborne Hardware* itself involved a boycott against private businesses. If its holding is extended to protect competitor boycotts, there is no logical reason why that extension should apply only to boycotts directed against governments.

[16] Both the court of appeals and the Commission found that the SCTLA boycott "was motivated primarily by economic self-interest"

In its cross-petition for certiorari, SCTLA has apparently sought to narrow the untenably broad positions it advanced before the Commission and the court of appeals, arguing now (88-1393 Pet. 7) that its boycott should receive First Amendment protection because the lawyers were acting as "surrogates" for persons "who could not or would not act for themselves." However, many businessmen can and do claim to be surrogates for persons who will benefit from, but are not well able to affect the quality of, the goods and services those businessmen purvey. Physicians who treat indigents under Medicaid programs are as much "surrogates" for their patients when they seek an increase in state Medicaid payments as the SCTLA lawyers were "surrogates" for their indigent clients. Engineers who collectively refuse to engage in competitive bidding on major public construction projects may claim that they are "surrogates" for the motoring public that uses bridges and roads but is in no position to decide

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(Pet. App. 43a). This finding is abundantly supported by a record showing that the dominant focus of the boycott was a rate increase for the lawyers, as opposed to numerous other measures arguably more relevant to the welfare of indigent clients (such as an increase in the number of compensable hours that a lawyer might spend on a single case) (*ibid.*). Although overwhelming evidence of the lawyers' parochial economic motivation makes this case a simple one, we agree with Judge Silberman's concurrence (id. at 58a-60a) insofar as it suggests that application of *Claiborne Hardware* should not turn on the subjective motivation of a particular group of price-fixing competitors. In practice, virtually *every* public price-fixing boycott directed against the government will involve mixed motives – competitors who want a price increase and also believe the public will benefit by spending more on their services. The dicta in *Claiborne Hardware* and *Allied Tube* cited above establish – and this Court should so hold – that price-fixing by competitors, whatever the precise (but unfathomable) ratio of avarice to idealism that motivates it, is simply not constitutionally protected conduct.

upon (or implement) the steps needed to maintain safe highways (see *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978)). Each of these groups, and many others as well, may make a "surrogacy" claim every bit as earnestly as respondents do. None, however, falls within *Claiborne Hardware*.

SCTLA's other proposed effort to distinguish its conduct—that by increasing the billing rates of lawyers, its boycott was designed to vindicate its clients' Sixth Amendment right to effective assistance of counsel (88-1393 Pet. 7)—is also insupportable. For one thing, as the court of appeals expressly noted, citing the Commission (Pet. App. 30a):

> Counsel for the petitioners [SCTLA] acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of their clients.[17]

The court of appeals nevertheless allowed both SCTLA and its amici to make arguments regarding the adequacy of pre-boycott representation that SCTLA had expressly disavowed before the Commission (Pet. App. 29a-32a). And in reliance on these arguments, the court of appeals declined to accept the Commission's affirmative finding that the pre-boycott level of representation was adequate (*id.* at 30a n.21).[18] In the end, however, the court recog-

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[17] Before the Commission, SCTLA characterized the debate as one over the level of subsidized representation appropriate for indigent defendants (Pet. App. 114a):

> There [was] a Chevrolet[] sort of quality * * * service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.

[18] The Commission had based its finding in part upon the fact that reversals of criminal convictions for ineffective assistance of counsel were "exceedingly rare" and in part upon SCTLA's representation to it that pre-boycott assistance was generally adequate (Pet. App. 112a).

nized (as had the Commission and ALJ (*id.* at 165a)), that there was no record basis from which one might conclude that pre-boycott rates had resulted in significant Sixth Amendment violations, and it explained how such a showing might have been made had SCTLA intended to do so (*id.* at 31a). As the court then concluded (*id.* at 31a-32a), the SCLTA lawyers

> have simply not pursued the argument, and their occasional references to the constitutional underpinnings of their boycott are but so much parsley to garnish the arguments they have made. Thus, we decide this case as it comes to us, upon a record that does not support, and by petitioners who do not seek a finding that the preboycott rates resulted in systematic violations of the Sixth Amendment.

Even if vindication of Sixth Amendment rights were a defense to price-fixing, the "one seeking relief bears the burden of demonstrating that he is entitled to it" (*Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984)). Having represented to the Commission that the public issue in their boycott was the proper level of funding for indigent legal services, rather than the constitutional adequacy of those services, SCTLA (and its amici) should not be heard to argue the opposite before this Court (see *United States* v. *L.A. Tucker Truck Lines,* 344 U.S. 33, 37 (1952)).

Finally, even if the record did show (which it does not) that the difference between the pre-boycott CJA rates and the post-boycott rates made the difference between receipt and denial of Sixth Amendment rights by indigents, and even if the record did show (which it does not) that the CJA lawyers' concern for the rights of their clients was the paramount motive for their price-fix, this still would not warrant constitutional protection for a price-fixing

boycott by competitors. "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it" (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 465; see also *Fashion Originators' Guild, Inc.* v. *FTC*, 312 U.S. 457, 467-468 (1941)).

There is no more reason to permit vigila .e price-fixing than to permit any other form of unlawful action undertaken by those purporting to further some higher purpose. And there is no apparent reason why the antitrust obligations (or the First Amendment rights) of competitors should turn on whether they offer a service that the government is expressly required to provide by the Bill of Rights (such as indigent legal services or habitable jails) or whether they merely offer services needed by the government to "provide for the common defence" or "promote the general Welfare" (Preamble, United States Constitution). If CJA lawyers did have a constitutional right collectively to withhold their services from the government "unless we are granted a substantial increase in our hourly rate," the same novel right could not, in any principled way, be denied a great many others.[19] As the court below recognized, that is a strong reason why no such right should be created.

II. THE COURT OF APPEALS INCORRECTLY HELD THAT, AS APPLIED TO THIS CASE, THE SHERMAN ACT'S *PER SE* PROHIBITION OF NAKED HORIZONTAL PRICE-FIXING AGREEMENTS CONTRAVENES THE FIRST AMENDMENT

As noted above, the court of appeals correctly recognized that the SCTLA boycott fell on the wrong side of the

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[19] Before the court of appeals, at least, SCTLA seemed to recognize this fact, maintaining that the legality of its boycott should not turn

line that this Court drew in *Noerr* between the First Amendment rights of competitors and their antitrust responsibilities to the public, and was likewise not a protected "political boycott" within the meaning of *Claiborne Hardware*. In a striking reversal of course, however, the court then considered whether SCTLA's conduct was protected if labeled an "expressive boycott" rather than "lobbying," and if judged by the standards of *O'Brien* rather than *Noerr*. Here the court erred in concluding that such an approach warranted any difference in treatment.

1. At the outset, we think it is doubtful whether the *O'Brien* test applies at all to the SCTLA boycott. In *O'Brien*, the Court upheld a defendant's conviction for wilfully destroying his draft card. The Court assumed, without deciding, that the "alleged communicative element" in defendant's conduct was "sufficient to bring into play the First Amendment" (391 U.S. 376), but it rejected the claim on the merits. The Court articulated a four-part test for assessing the constitutionality of a regulation that affects expressive conduct. Such a regulation, the Court explained, may be justified (*id.* at 377):

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

But while the Court in *O'Brien* recognized that some nonverbal activity may deserve First Amendment protec-

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upon whether its members sought to vindicate the constitutional rights of their clients or sought merely to improve the quality of legal care they received (86-1465 Pet. Br. at 36-37).

tion as "symbolic speech," it firmly rejected the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (*O'Brien*, 391 U.S. at 376). See also *Texas* v. *Johnson*, No. 88-155 (June 21, 1989), slip op. 6; *Spence* v. *Washington*, 418 U.S. 405, 409 (1974); *Cohen* v. *California*, 403 U.S. 15, 18 (1971). Wherever the line between protected and unprotected activity is ultimately drawn, it seems apparent—if the Court's statement in *O'Brien* is to be meaningful at all—that respondents' price-fixing boycott should not trigger the four-part inquiry mandated by that decision.

The application of *O'Brien* in this context is fundamentally inconsistent with the delicate balance, articulated by this Court, between First Amendment principles and the commands of the Sherman Act. On the one hand, the *Noerr* doctrine and *Clairborne Hardware* give substantial protection to "expressive" activity that might otherwise fall within the broad language of the antitrust laws. At the same time, the Court has carefully confined those cases to their proper sphere, recognizing that "[t]he First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade' " (*Professional Engineers*, 435 U.S. at 697 (citation omitted)). By superimposing the *O'Brien* standard on the Court's existing doctrines, the court of appeals' decision upsets that accommodation.[20]

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[20] Even acts of pure speech that are "an essential and inseparable part" (*Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 502 (1949)) of an antitrust violation lack constitutional protection. In *Professional Engineers*, for example, a district court found that the Society, an organization of professional engineers, had violated the Sherman Act by agreeing to refrain from competitive bidding. The district court ac-

Moreover, to the extent that the SCTLA boycott is plausibly analogized to a "strike" it does not, for that reason, secure any special protection under the First Amendment. "The right to strike," this Court has observed, is "vulnerable to regulation" (*International Union, UAW* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949)). Consistent with that fact, Congress has, at different times, both expanded (see, *e.g.*, Norris-LaGuardia Act, 29 U.S.C. 104; *Order of R.R. Tel.* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960)), and contracted (see, *e.g.*, Railway Labor Act, 45 U.S.C. 151-188; *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957); and Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. 185(a); *Boys Mkts., Inc.*, v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)), the right to strike. See also *Dorchy* v. *Kansas*, 272 U.S. 306, 311 (1926). Indeed, strikes by public employees are usually subject to strict regulation, free from First Amendment scrutiny. See 5 U.S.C. 7311(3) (no right to strike against the United States or District of Columbia government); 18 U.S.C. 1918 (criminal penalty for violation of 5 U.S.C. 7311).[21]

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cordingly enjoined the organization from adopting any policy statement that stated or implied that competitive bidding was unethical. This Court rejected the Society's contention that such an injunction abridged its First Amendment rights. "Having found the Society guilty of a violation of the Sherman Act," the Court explained, "the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences" (435 U.S. at 697). The Court stated that "[w]hile the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation" (*ibid.*).

[21] In fact, this Court has held that even a work-stoppage with overtly and exclusively political content falls outside the protections of the First Amendment. In *International Longshoremen's Assoc.* v. *Allied*

It should also not matter that the boycotters "actively courted media coverage of their 'strike' " or that "[t]he media responded with a number of newspaper articles and television stories" (Pet. App. 47a). Respondents were not charged with successful public relations; they were charged with a concerted refusal to deal at prevailing prices. It cannot be that a price-fixer secures the First Amendment protection offered by *O'Brien* simply by garnering favorable publicity.

2. Even if *O'Brien* were properly applied to the facts of this case, however, the *per se* rule against naked horizontal price-fixing satisfies its standards. The court of appeals here recognized that the Sherman Act, including its categorical prohibition of naked horizontal price-fixing without regard to market power, easily met the first three prongs of the *O'Brien* test (Pet. App. 47a). The Sherman Act lies clearly within the constitutional power of Congress, the interest it serves is in no way directed to the suppression of expression, and the interest it promotes is important and substantial. As this Court has repeatedly observed:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the

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International, Inc., 456 U.S. 212 (1982), the Court unanimously held that a union's refusal to unload cargoes shipped from the Soviet Union, in order to protest the Russian invasion of Afghanistan, constituted an illegal secondary boycott under the National Labor Relations Act, 29 U.S.C. 158(b)(4). The Court explained that it had "consistently rejected the claim that secondary picketing by labor unions * * * is protected activity under the First Amendment" (456 U.S. at 226). And the court added that "[i]t would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment" (*ibid.*).

> Bill of Rights is to the protection of our fundamental personal freedoms.[22]

In concluding that the Sherman Act's prohibition of price-fixing failed the fourth *O'Brien* criterion, the court of appeals reasoned that the underlying "policies of the antitrust laws" (Pet. App. 48a) (to prevent and eradicate trade restraints that harm competition) could still be achieved if proof of market power were required to determine the legality of every "expressive" price-fixing boycott. The court dismissed the *per se* ban on naked price-fixing as serving "only" (*id.* at 49a) to promote administrative convenience and efficiency in achieving the substantive purpose of the Sherman Act, and held (implicitly) that this governmental interest was so insubstantial that it must yield in the face of a party's desire to use a "*per se* violation of the Sherman Act" to further a lobbying campaign. We disagree.

a. Even if the court of appeals properly characterized the Sherman Act's blanket prohibition on naked horizontal price-fixing as "only" an administrative aid, invalidation of the *per se* rule in this case runs squarely afoul of *O'Brien* itself. *O'Brien* sustained a *per se* requirement that all draft-eligible men possess a draft card, notwithstanding that this requirement was but an "administrative aid" that helped to assure the "smooth and efficient function[]" of the draft (391 U.S. at 382).

That *O'Brien*'s telling result did not turn, as the court of appeals speculated, on the fact that it involved "Congress's effort to raise and maintain an army during a period of international conflict" (Pet. App. 50a), is clear from *United*

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[22] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110-11 (1980), citing *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 n.16 (1978).

States v. *Albertini*, 472 U.S. 675 (1985). *Albertini* involved a peacetime challenge to an administrative bar order applied to exclude a former serviceman from a military base "open house." Application of the bar order denied Albertini an opportunity to express his views at the open house as other members of the public were allowed to do. Enforcement of the order was "not 'essential' in any absolute sense to security at the military base," for the government could have fashioned a "less restrictive" means of protecting its interests—such as by "provid[ing] [respondent] with a military police chaperone during the open house" (*id.* at 688). Nonetheless, this Court held that "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. * * * Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech" (*id.* at 688-689). Rather, the Court explained, "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" (*id.* at 689). Applying that standard, the Court upheld the bar order under *O'Brien*.

This Court's holding in *Albertini*, with which no Justice disagreed,[23] contrasts sharply with the sentiment ex-

[23] Three Justices dissented from the majority's conclusion that the statutory prohibition covered the conduct in question, but there was no dispute with the majority's articulation of the proper test to be applied in determining whether the First Amendment, as construed in *United States* v. *O'Brien*, forbids application of a statute to conduct undertaken for the purpose of expressing a point of view. See 472 U.S. at 691-702.

pressed by the court of appeals' statement that "we do not say that administrative convenience may never justify an incidental restriction on expressive conduct" (Pet. App. 50a). *Albertini* leaves no room to doubt that efficacy in achieving important governmental purposes is itself a substantial governmental interest that courts are not free to disregard.[24]

b. The court of appeals' interpretation of *O'Brien* also disregards this Court's admonition that the validity of a law attacked under *O'Brien* should not be judged "solely by reference to the demonstration at hand." Rather, one must consider the outcome if, "absent the [challenged] prohibition," others were to claim the favored constitutional treatment sought by the group before the court. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 296-297;[25] accord, *United States* v. *Albertini*, 472 U.S. at 688-89; see also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981). Such consideration in this case demonstrates that the impact on antitrust enforcement of giving special treatment to the SCLTA lawyers would, in fact, be very broad.

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[24] The court of appeals itself recognized that the *per se* rule against price-fixing is an important administrative aid in enforcing the Sherman Act, serving goals of " '[b]usiness certainty and litigation efficiency' " (Pet. App. 19a-22a, citing *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 344). Although any required showing of market power would necessarily disserve these important interests, the damage done by the court of appeals' holding is compounded by its peculiarly complex definition of market power, discussed in Part III, *infra*.

[25] In *Community for Creative Non-Violence*, the Court denied First Amendment protection under *O'Brien* to homeless persons who, in order to facilitate an expressive demonstration, violated Park Service regulations that forbade camping in Lafayette Park.

The court of appeals purported to limit its holding to the "peculiar facts of this case" (Pet. App. 56a), but the court identified no facts that would permit such a limitation. In effect, the court's opinion accords favored treatment to any price-fixing boycott in which (1) competitors first make "active efforts to appeal to the public for support of their demand"[26] (2) against a governmental target[27] and (3) style their subsequent boycott as a continuation of this effort (*id.* at 50a-51a). Although the parameters of the court's decision are unclear, it may be invoked by the parties to a multitude of actual or threatened price-fixing boycotts that are conducted in public (or easily could be) and that begin with an entirely lawful public effort by conspirators to persuade the government to confer (in the name of the "public interest") whatever benefit they seek.

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[26] The court of appeals also suggested that the issue involved must be a matter of "public debate" (Pet. App. 50a), but nowhere defined that term or identified any First Amendment principle that would allow courts to accord greater rights to lawyers advocating increased public spending on legal care than to any other suppliers urging more government spending for their good or service. A "public debate" test thus does not narrow the "appeal to the public" criterion. We have explained earlier (Part I, *supra*), why a "public debate on constitutional issues" test is also untenable, either to describe the facts of this case, or as a basis for legalizing "expressive price-fixing."

[27] Although the court limits its holding to price-fixing against governmental targets, the logic of that result might not strike future courts or litigants as so confining. The court recognized that the *Noerr* doctrine, which applies to lobbying, did not apply here. Its conclusion that the SCTLA boycott deserved a "measure of First Amendment protection" was based, instead, upon the more general assertion that the boycott was used as a means of "expression." If such a right to fix prices to communicate (deriving from *O'Brien* rather than *Noerr*) were created, future litigants might well invoke it even in defense of "expressive price-fixing" directed at a private target.

A few examples from the Commission's own experience demonstrate the broader implications of the court of appeals' decision. In many states, a small fraction of all licensed physicians treats a large fraction of the indigent consumers who rely on state or federal payments for medical care. These physicians and their colleagues frequently combine to urge increases in Medicaid payments or the like, appealing to the public and invoking the welfare of their indigent patients as a reason to increase physicians' fees. When their lobbying fails, physicians sometimes go further, collectively refusing to provide medical care to indigent patients unless the applicable rates are raised. Fortunately, such concerted price-fixing boycotts, although often discussed, have thus far been infrequent—hardly surprising given that most people have considered them illegal *per se*.[28]

By abrogating *per se* treatment and requiring exhaustive proof of market power as well as the weighing of such power against the expressive goals of a Medicaid boycott (see part III, *infra*), the court of appeals' approach would vastly complicate administrative adjudication of the legality of such restraints. The court's decision would also make

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[28] There are always, however, the intrepid few (*e.g.*, *O'Halloran*, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (FTC Aug. 26, 1988) (FTC consent agreement; alleged concerted refusal by five Rhode Island obstetricians to accept indigent cases absent Medicaid increase); *Thomas L. Looby, M.D., Lee M. Mabee, Jr., M.D.*, 5 Trade Reg. Rep. (CCH) ¶ 22,570 (FTC July 20, 1988) (consent agreement and complaint) (alleged collective withholding of services from state medical college; "expressive boycott" defense raised by party in litigation); *Chain Pharmacy Ass'n of New York, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,676 (FTC Apr. 26, 1989) (consent agreements and complaint) (alleged collective refusal by pharmacies to participate in state prescription payment plan); cf., *e.g.*, Raup, *Medicaid Boycotts by Health Care Providers: A Noerr Pennington Defense*, 69 Iowa L. Rev. 1393 (1984)).

it much harder for state or municipal targets of such boycotts to obtain preliminary injunctions against the participants, because plaintiffs would be obliged to show not merely concerted action and harmful effects, but convincing threshold evidence of market power as well.[29]

Another situation that is often threatened, but rarely occurs because the antitrust laws so clearly forbid it, is the concerted refusal by insurance companies to underwrite business in a jurisdiction that refuses to accord an economic benefit they have lobbied to obtain.[30] Although hundreds of insurance companies do business throughout the United States, often only a small number elect to underwrite certain forms of coverage in a particular locality, such as the District of Columbia. These companies frequently lobby jointly for various legislative benefits or against what they perceive as ill-founded legislative initiatives. Also frequently, insurance companies conduct their lobbying through appeals to the public (for example, by means of newspaper advertisements, explaining how the majority of policyholders would face higher premiums if legislation forbidding discrimination against certain individuals were not rejected). By arguing that a boycott of new business is a means of communicating their point of

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[29] Although the court was apparently moved to surmise that some District of Columbia officials encouraged the SCTLA boycott (Pet. App. 54a n.35), a sad irony of its holding is that if the D.C. government (or other state or local entity) wishes to resist the next such boycott, the antitrust laws might no longer help in that effort.

[30] The McCarran-Ferguson Act, 15 U.S.C. 1011-1015, exempts the "business of insurance" from federal antitrust regulation to the extent that it is regulated by state law, but nothing in that Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation" (15 U.S.C. 1013(b)). See generally *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

view, insurers could presumably escape *per se* condemnation of their conduct as did the SCTLA lawyers in the court below.[31]

There is, in short, no way to confer the right of "expressive boycott" upon competing lawyers without also conferring it upon insurers, doctors, pharmacies, accountants, engineers, and a multitude of other competitors who seek every day to promote both their parochial economic interests and their vision of the public good in the public arena. That any holding protecting the SCTLA lawyers' conduct here from *per se* liability would necessarily extend far beyond the "demonstration at hand" is, as *Community for Creative Non-Violence* and *Albertini* teach, a reason why application of the *O'Brien* test to the conduct here does not protect it.

3 This case cannot be distinguished from *Albertini* and *Community for Creative Non-Violence* by the court of appeals' puzzling assertion that the Sherman Act's *per se* prohibition of naked horizontal restraints is "not a statutory command" (Pet. App. 49a).[32] The *per se* prohibition against naked horizontal price-fixing agreements is an important, well-established rule of substantive law

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[31] And given the difficulty of proving market power as defined by the court of appeals (see Part III, *infra*), dispensation from the *per se* rule might well encourage even such large corporations as insurance companies to engage in "expressive boycotts."

[32] To support this proposition, the court of appeals cited (Pet. App. 49a) the Commission's appellate brief (at 39) and this Court's decision in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15-16 n.25 (1984). But those sources state only that the *per se* rule promotes goals of law enforcement convenience and efficiency. Many provisions of law are framed to promote efficiency and clarity in achieving some underlying substantive purpose of the legislature (*e.g.*, the requirement to possess a draft card sustained in *O'Brien* itself), a fact that has never been thought to diminish the obligation of citizens to obey, or courts to enforce, such provisions.

that deters antitrust violations and facilitates antitrust enforcement by identifying with precision conduct that is prohibited by the Sherman Act. Although the language of the Sherman Act itself is cast broadly (*e.g.*, "[e]very contract * * * in restraint of trade"),[33] and has required judicial elaboration, this Court has "not wavered" in construing the statutory language to forbid naked horizontal price-fixing without proof of market power. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 347; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 218, 221; R. Bork, *supra*, at 66-67. The language of a statute, as construed unvaryingly by this Court, is surely a "statutory command" that all persons must obey and that courts of appeals must enforce. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (reversing court of appeals for failure to apply *per se* rule to naked horizontal restraints).

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[33] Even in the face of a First Amendment challenge, the mere fact that a statute prohibits a broad range of conduct affords no reason for refusing enforcement. See, *e.g.*, *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. at 225 (rejecting First Amendment challenge to statute prohibiting secondary boycotts that Congress had "purposefully drafted in broadest terms"). The court of appeals cited *In re Primus*, 436 U.S. 412, 434 (1978), for the proposition that " '[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs' " (Pet. App. 50a). But *Primus* involved (1) a direct regulation of speech (a ban on solicitation that the state sought to apply to a "letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization") and (2) communication by a lawyer of "an offer of free assistance by attorneys associated with the ACLU * * * * to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than derive financial gain" (436 U.S. at 422). *NAACP* v. *Button*, 371 U.S. 415 (1963), also cited by the court (Pet. App. 49a), is similarly inapposite.

Nor may this case be distinguished from *Albertini* by the court of appeals' assertion that "[t]he antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power" (Pet. App. 49a). This Court has repeatedly held that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 109; see also, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. at 461-462; *Professional Engineers*, 435 U.S. at 692). Of course, the antitrust enforcement authorities have discretion to pursue only those price-fixing conspiracies in which they believe market power exists, just as a statutorily-mandated speed limit leaves a radar patrolman discretion to ticket only motorists caught driving dangerously in excess of the posted speed. However, this does not mean that a reviewing court may second-guess that prosecutorial judgement by requiring a formal demonstration of market power. The validity of the Commission's order "does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" (*Albertini*, 472 U.S. at 689).[34]

The court of appeals' proposed suspension of the *per se* rule in this case also cannot be defended by pointing to other contexts in which the Court has revised the categories of trade restraints subject to *per se* condemnation. See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints

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[34] In fact, the FTC focuses its resources upon trade restraints in which it believes market power is likely to exist. In the present case, for example, it concluded that a price-fixing agreement involving nearly every D.C. lawyer who made a practice of representing indigent clients involved the exercise of market power. (See Part III, *infra*.)

judged by rule of reason), overruling *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (vertical territorial restraints *per se* unlawful). Plainly, courts construing the Sherman Act must take account of changed understandings about the competitive effects of certain kinds of restraints. But that does not authorize a lower court to depart from an established *per se* rule because, in its view, some other social good—wholly apart from the statutory purpose of preserving competition—may come of it. See *Professional Engineers*, 435 U.S. at 694-696. At bottom, that is what the court of appeals did in this case.

4. Finally, many areas of law besides antitrust would be adversely affected if the court of appeals' novel reading of *O'Brien* were substituted for this Court's holding in *Albertini*. A brief consideration of such consequences demonstrates why this Court's holding in *Albertini* is far preferable. Many statutes prohibit more than those instances of conduct that cause the substantive harm the legislature seeks to prevent. Such "overinclusiveness" helps make laws "more certain to the benefit of everyone concerned" (*Northern Pac. R. R.* v. *United States*, 356 U.S. 1, 5 (1958)), and thereby allows effective statutory enforcement. If courts may ignore the value of clarity and enforcement effectiveness, citing *O'Brien* to rewrite "overinclusive" laws whenever a party sincerely desires to enhance the appeal of a stalled lobbying campaign by engaging in unlawful conduct, the effects on society would be profound.

To cite the most obvious example, the many federal and state laws categorically prohibiting strikes by public employees or other selected groups, without regard to whether the strikers can be proven to possess market power or to have demonstrably harmed the public interest, could scarcely survive the lower court's reading of *O'Brien*

in this case.[15] Such laws, as construed, typically prohibit any "refusal in concert with others to provide services to one's employer" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 884 (D.D.C.) aff'd mem, 404 U.S. 802 (1971)), just as the Sherman Act categorically prohibits naked price-related refusals to deal by competing entrepreneurs. It could scarcely be contended that the laws against public employee strikes are unconstitutional because that they forbid such strikes *per se* without requiring a particularized showing of the strikers' capacity to inflict harm.

The court of appeals saw this case as one of "first impression" (Pet. App. 56a),[16] in which it was obliged to balance the First Amendment rights of competitors with the antitrust rights of the public. But this Court has already carefully struck that balance in the *Noerr* doctrine which, as the court of appeals recognized, does not protect

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[15] The court of appeals considered it a point strongly in SCTLA's favor that its boycott resembled a "strike" (Pet. App. 50a). But that analogy undermines SCTLA's position, because "there is no constitutional right to strike" (*United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 883 (D.D.C.) (three-judge court), aff'd mem., 404 U.S. 802 (1971)). Any "right to strike" without antitrust consequences that does exist derives only from an express statutory exception to the antitrust laws (15 U.S.C. 17; 29 U.S.C. 52) and other statutory provisions (see p. 27, *supra*). SCTLA has never suggested—nor could it—that such provisions apply to it (Pet. App. 7a n.6).

[16] This is true only in the trivial sense that no court has previously addressed SCTLA's inventive claim that summary condemnation of price fixing is unconstitutional under *O'Brien*. Courts have routinely applied the Sherman Act to "speech" used to effect a restraint of trade. See, *e.g.*, *Professional Engineers*, 435 U.S. at 693-695, ("no elaborate * * * analysis" (and certainly none of market power) required to condemn "on its face" speech in the form of a code of ethics prohibiting engineers from bidding competitively to design "large-scale projects significantly affecting the public safety").

price-fixing boycotts. Just as solicitude for the wish of a former serviceman to express his views at a military base "open house" did not permit a court to suspend a bar order against him (*Albertini*), and solicitude for the wish of homeless people to protest their dire condition did not permit a court to suspend applicable Park Service regulations (*Community for Creative Non-Violence*), so too solicitude for the wish of a lawyers' trade association to advocate a rate increase for its members does not permit a court to suspend operation of the *per se* rule against price-fixing.

Because the Sherman Act's *per se* prohibition of naked price-fixing agreements "promotes a substantial governmental interest that would be achieved less effectively absent the regulation" (*Albertini*, 472 U.S. at 689), *United States* v. *O'Brien* does not require or permit alteration of that prohibition in this case.

III. THE COURT OF APPEALS ERRED BY REQUIRING FURTHER PROOF OF MARKET POWER DESPITE EVIDENCE OF THE BOYCOTT'S ACTUAL DETRIMENTAL EFFECTS ON COMPETITION

The court of appeals' error respecting application of the *per se* rule against public price-fixing boycotts is compounded by its additional holding that, in such cases, the government must prove market power even where the boycott has led to demonstrated anticompetitive effects. The court's ruling on this point contravenes decisions of this Court and would create extensive confusion among businesspersons and antitrust enforcers alike in attempting to fathom when price-fixing agreements are lawful and when they are not.

Where evidence regarding market power is properly required in an antitrust case, its purpose is to enable the court to determine whether a challenged restraint is actually likely to cause anticompetitive effects, *i.e.*, increased

prices or decreased output (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110-111 n.42). Thus, as this Court has recently reiterated, even where market power is arguably an element of the antitrust offense, " 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects' " (*FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986) (citing 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

The Commission applied this Court's teaching in holding that, in addition to being *per se* illegal, the SCTLA boycott was unlawful under a rule of reason analysis. The Commission found that the boycott, joined by nearly 100% of all CJA "regulars" (those who made a practice of representing indigent defendants under the CJA), had "dramatically reduced the supply of lawyers to the city's CJA program," had "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and had "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]" (Pet. App. 96a). The Commission also found "a direct causal link between the [lawyers'] coercive boycott and the city government's capitulation to their demands" (*id.* at 97a), noting that the City had increased CJA rates only after the boycott had occurred, and only because it had resulted in an imminent "crisis" in the courts.[17]

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[17] The Commission also affirmed the conclusion of the ALJ "that the [SCTLA lawyers] had market power, *i.e.*, the ability to raise price above the competitive level, *NCAA* v. *Board of Regents*, 468 U.S. at 109)" (Pet. App. 92a n.79). The ALJ based his conclusion on findings that "[SCTLA's] argument that the CJA lawyers lacked the power to

Notwithstanding these findings, the court of appeals hypothesized that because the CJA lawyers' price-fixing boycott was designed to "communicate," the boycott's adverse effects could have resulted from "political" rather than "economic" power (Pet. App. 53a-55a). In the court's view, it was conceivable that "lacking any market power, [SCTLA] procured a rate increase by changing public attitudes through the publicity attending the boycott"[38] and that the reduced supply of lawyers to city courts that attended the boycott merely "reflect[ed] the success of SCTLA's persuasive campaign among other lawyers who were in the same market but were also in political sympathy with [SCTLA]" (*id.* at 53a-55a).

The court of appeals' logic proves too much, for it could just as easily be applied to any publicly conducted boycott.

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create a court emergency and thereby force the District government into passing Bill No. 5-128 is contradicted by the entire record," that "the use of emergency alternatives to the CJA lawyers * * * constituted no meaningful restraint on [their] power," that "no long-term alternative to the CJA lawyers would have solved the emergency situation," and that "without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest" (*id.* at 205a-206a).

[38] Contrary to the court of appeals' surmise, the ALJ found expressly that (Pet. App. 194a (footnotes omitted)):

> [w]hile the hoopla organized by SCTLA did attract media attention and editorial support, there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.

The court of appeals felt it was not required to credit this finding because the Commission had not expressly adopted it in its own opinion (*id.* at 54a). However, the Commission did expressly adopt the ALJ's finding that the SCTLA lawyers had market power (note 37, *supra*), a fact that the court of appeals ignored.

The effect of its new exception would be virtually to swallow this Court's common sense rule that proof of adverse effects obviates proof of market power. Left unreversed, the approach would significantly complicate the litigation of "expressive price-fixing" cases and severely challenge the ability of prosecutors and defense counsel alike to ascertain in advance of full-blown litigation whether any instance of such price-fixing is lawful or not.

The success of any price-fixing boycott depends both upon the continued adherence of those who participate in the agreement, and upon the forebearance of those who, though not themselves parties to any agreement, might "break" the boycott if they elected to provide the good or service in question. Boycotts are often accompanied by public pronouncements from the participants that invoke the public interest in their cause and urge those who are not participating to support those who are. Thus, it will be open to successful boycotters to argue, as plausibly as SCTLA did here, that their success was merely a result of the "persuasive" effect of the boycott's "expressive" component upon those who might otherwise have blunted the boycott's effect. If one ignores, as the court of appeals did, the pragmatic analysis of power and effect performed by the ALJ and Commission, it is hard to imagine how any antitrust plaintiff could ever prove the existence of market power to the court's satisfaction, short of the "exhaustive and time consuming market definition exercise * * * endemic to merger litigation" that the court of appeals expressly disavowed (Pet. App. 55a).[39]

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[39] Indeed, the market power analysis decreed by the court in this case would often be far more difficult and time-consuming than that in most merger cases, which typically involve large markets with comparatively few companies. The typical "expressive price-fixing" case, by contrast, will usually involve a state or local service market (*e.g.*,

Likewise, the court of appeals' refusal to treat the City's payment of a higher legal service price as an adverse effect of the boycott reflects an approach that could be adopted in any case. Whenever the institutional target of a boycott acquiesces in the perpetrators' demands, it is always possible to argue that the target did so in response to "political" rather than "economic" power, and that it considered the boycotters' demands to be "in the public interest" or "politically correct," rather than that the target was "economically" coerced. Having capitulated to a price-fixing boycott orchestrated by a well-organized interest group, government officials might well wish only to announce that the public interest has been served, make peace with the only group of their constituents vitally interested in the matter (the economic interest group that has succeeded in its boycott), and put the matter behind them.[40]

The court of appeals recognized that "[d]istinguishing between the political and economic motives [of the par-

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CJA lawyers, Medicaid doctors, local pharmacies protesting state prescription reimbursement schemes) about which precise data do not exist and are difficult to obtain. Moreover, the number of different entities whose possible inclusion in such markets must be considered will often be enormous, given the court of appeals' apparent view here that the Commission must assess whether the market for indigent legal services included not only those who provide such services at the time of the boycott, but the nearly 14,000 other lawyers who possessed the statutory qualification (D.C. bar membership) to do so. See also, Kovacic, *Illegal Agreements With Competitors*, 57 Antitrust L. J. 517, 535 n.80 (1988) (discussing opinion below and difficulties of measuring market power in public procurement contexts).

[40] No doubt that is one reason why this Court has long held that neither acquiescence nor the knowing "wink" or "tacit[] approval" of government employees or other boycott targets bears on a boycott's legality. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 226-227.

ticipants in a price-fixing boycott] is a daunting task, even for a reviewing court" (Pet. App. 42a). But the court's decision would as a practical matter impose on antitrust enforcers or boycott victims the far more "daunting" task of proving the motives of nonparticipant bystanders who merely forebear to take affirmative action to break a boycott and the motives of the legislature and other government decisionmakers who capitulate to it—all in order to divine the "real" reason why a boycott succeeded.

Finally, even were the Commission able to intuit how the court of appeals intended it to measure "market power" in this case, its labors would not be at an end. For the court of appeals also instructed the Commission to determine "how much market power is sufficient to justify the condemnation of an expressive boycott" (Pet. App. 56a). The court of appeals did not explain how its command is to be obeyed. Whatever the court of appeals' opinion means, the inquiry it mandates is plainly beyond the competence of any agency or court to perform.

In rejecting, more than ninety years ago, the claim that the legality of price-fixing should turn on the reasonableness of the prices being fixed, Judge (later Mr. Chief Justice) Taft recognized that this inquiry would condemn the courts to "set sail on a sea of doubt" from which they might never return (*United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899)). The court of appeals' untethered application of the *O'Brien* test, and its baffling standard for assessing market power, pose equivalent risks. This Court should reject them.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
MICHAEL BOUDIN
Acting Assistant Attorney General
KEVIN J. ARQUIT
General Counsel
JAY C. SHAFFER
Deputy General Counsel
ERNEST J. ISENSTADT
KAREN G. BOKAT
Attorneys

JUNE 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 693 00316

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QUESTIONS PRESENTED

1. Whether a public boycott aimed at petitioning the legislature, and perceived as political expression by elected government officials, was intended to be reached by the antitrust laws.

2. Whether the antitrust laws should be construed to condemn a legislative petitioning boycott *per se*, without any inquiry into whether the boycott participants did or even could exercise economic coercion.

3. Whether application of a *per se* rule to a legislative petitioning boycott is so much more restrictive of political expression than necessary to advance the general governmental interest in competition as to be barred by the First Amendment.

4. Whether the reasons for barring application of the *per se* rule to a petitioning boycott can be satisfied by a "truncated" rule of reason analysis, which assumes—rather than requiring proof—that the challenged conduct had an anticompetitive effect.

PARTIES TO THE PROCEEDINGS

Petitioner/Cross-Respondent is the Federal Trade Commission. Respondents/Cross-Petitioners, all of whom were petitioners in the proceedings before the Court of Appeals and respondents in the proceedings before the Federal Trade Commission, are the Superior Court Trial Lawyers Association ("SCTLA") and Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight (the "Individual Respondents"). None is incorporated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1198, 88-1393

FEDERAL TRADE COMMISSION,
Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners

v.

FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT/CROSS-PETITIONER SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

STATEMENT OF THE CASE

This case concerns the Federal Trade Commission's efforts to condemn as a *per se* violation of the antitrust laws the highly publicized "strike" staged by Respondents

and others in 1983.[1] Respondents struck to focus public attention on the need for legislation increasing the statutory maximum rate of compensation for representation of indigent criminal defendants under the District of Columbia Criminal Justice Act, D.C. Code § 11-2601 *et seq.* (1981) (the "D.C. CJA"). The strike was an integral part of a long-running dialogue among the bar and bench, civic leaders, study groups, and the legislative, executive, and judicial branches of the D.C. government. To understand the political context and nature of the strike, that dialogue must be briefly described.

1. Representation of Indigent Criminal Defendants Under the D.C. Criminal Justice Act

In the District of Columbia, the assistance of counsel guaranteed by the Sixth Amendment is provided to indigent defendants through a mixed system comprised principally of government attorneys employed by the

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[1] Respondents' challenged conduct is referred to herein as a "strike" because that term was commonly used in the press and by the participants at the time. It was not a strike in the technical sense used in the context of labor disputes, however, and it did not involve a complete work stoppage, since the lawyers continued to handle cases to which they had already been appointed. (C.A. App. 187, 515b.) For simplicity, the term "Respondents" is used to refer to Respondents in No. 88-1198, Cross-Petitioners in No. 88-1393. The following citation forms are used in this brief: "C.A. App." refers to the Joint Appendix used in the Court of Appeals, ten copies of which were lodged with this Court in lieu of a printed Appendix pursuant to the parties' joint Motion to Dispense With Joint Appendix, which motion was granted by this Court on June 5, 1989. "Pet. App." refers to the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198. "FTC Br." refers to the FTC's brief on the merits. Testimony at the hearing before the Administrative Law Judge not included in the Court of Appeals Appendix is cited as "Tr. —— (witness name)." "CX" "RX" and "JX" refer, respectively, to the admitted exhibits offered at the hearing by Complaint Counsel, by Respondents, and jointly. References to the transcript page at which exhibits were admitted are given parenthetically after the exhibit citation.

District's Public Defender Service ("PDS") and private attorneys ("CJA lawyers") compensated under the D.C. CJA.

The D.C. CJA, which was enacted in 1974, created a Joint Committee on Judicial Administration of the District of Columbia Courts ("Joint Committee") with authority to establish maximum rates of compensation not exceeding those established by the federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982 & Supp. 1989) ("federal CJA"). *See* D.C. Code § 11-2604 (1981 & Supp. 1988). As amended in 1970, the federal CJA provided for reimbursement at the rate of $20 an hour for out-of-court time and $30 an hour for in-court time, with an overall compensation limit of $400 per misdemeanor and $1,000 per felony. Pub. L. No. 91-447, § 1, October 14, 1970, 84 Stat. 916. The per-case ceilings, but not the maximum rates, were waivable in certain circumstances. The Joint Committee adopted the federal rates and per-case limits for the D.C. CJA.

The rates thus established were maximum rates. Judges retained full discretion under D.C. Code § 11-2604(d) to award less than the amount requested by CJA lawyers, and frequently did so, generally without stating any reasons for the reduction. (C.A. App. 105-06, 151, 419-21, 448-49, 453-54, 626; *Thompson v. District of Columbia*, 407 A.2d 678 (D.C. 1979).) The maximum rates under the federal CJA and D.C. CJA were not increased from 1970 to the time of the strike in 1983.

2. Efforts of Judicial and Bar Groups to Raise the Maximum Rates of Compensation Under the Criminal Justice Act

Even as it established the federal CJA rates in 1970, Congress recognized that they were low. S. Rep. No. 91-790, 91st Cong., 2d Sess. 14-15 (1970). By 1972, Justice Powell had observed that compensation for rep-

resentation of indigent defendants was "generally inadequate," so that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). By 1983, it had become obvious that these rates were "woefully inadequate" and "scandalously low." (Tr. 1082 (testimony of John H. Pickering); C.A. App. 324 (testimony of Geoffrey C. Hazard); *see also* Tr. 1451, 1418, 1434 (testimony of Norman Lefstein, an expert on the provision of criminal defense services).) Not only had the Consumer Price Index increased by 140% since 1970, but new bases for procedural and evidentiary motions had substantially increased the time required for investigation, research, motions practice, and trial preparation. As a result, lawyers doing CJA work faced "additional procedural obligations . . . at the very time when the courts (and bar associations) indicated a willingness to consider claims of malpractice" and other sanctions. (Pet. App. 174a-75a; Tr. 1138-42 (Hazard).)

The consensus of expert opinion, as found by the Administrative Law Judge, was that the inadequacy of the CJA rates adversely affected the quality of representation by compelling inordinately large caseloads, discouraging experienced attorneys from continuing to practice CJA work, and depriving CJA lawyers of even the rudimentary secretarial and other support needed to practice law. (Pet. App. 175a-77a.) CJA attorneys typically worked out of their homes or briefcases and did their own typing because they could not afford to do otherwise. (Pet. App. 177a; Tr. 1439-40 (Lefstein); Tr. 646-47 (Perrotta); Tr. 793 (Koskoff); Tr. 952 (Slaight); C.A. App. 263-64 (Slaight).) They could not afford to attend continuing legal education courses. (JX 8 at 82-83 (Tr. 66); JX 10 at 80-81, 100-02, 124-25 (Tr. 66).) These conditions eventually drove the more experienced and capable attorneys, even those initially motivated by a dedication to public service, into more lucrative fields.

(Pet. App. 176a.) The loss of attorneys with two or three years experience was, according to Professor Hazard, "the most pernicious effect" of a low rate. (Pet. App. 176a.)

Concerned that the guarantees of the Sixth Amendment were at risk, judicial and bar groups initiated efforts to amend the 1970 rates as early as 1975. In that year, the "authoritative" report of a joint committee of the Judicial Conference of the D.C. Circuit and the District of Columbia Bar (Unified), commonly referred to as the Austern-Rezneck Report, concluded that the existing rates were not adequate. It found that the low rates of compensation resulted in "reduced services" to clients and noted that "a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection." (C.A. App. 770, 766 (Tr. 608).) The committee recommended that the CJA hourly rate be increased to $40 per hour for time both in and out of court. (C.A. App. 762 (Tr. 608).) The report declared:

> We are mindful that many lawyers practicing under the Act are willing to accept appointments at current rates, but believe that the proposed increase in compensation represents the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.

(C.A. App. 771 (Tr. 608).) Nonetheless, the D.C. Council did not act. (Pet. App. 174a.)

In 1982, the report of the D.C. Bar Court System Study Committee again recommended that the CJA hourly rates be increased promptly to at least the level proposed by the Austern-Rezneck committee, and the D.C. Bar adopted a resolution supporting legislation to increase the level of compensation. (C.A. App. 783-85 (Tr. 608).) About the same time, a bill was introduced in the

D.C. Council to increase the D.C. CJA hourly rate to $50. No hearings were held, however, and the bill died in committee. (Pet. App. 178a-79a.)

Contemporaneously, efforts were being made to increase the maximum rates under the federal CJA, which, if successful, would automatically have authorized an increase in the maximum D.C. rates as well. These efforts, spanning several years, were led by the Judicial Conference of the United States, the American Bar Association, and numerous other bar and judicial groups. (C.A. App. 652-732 (Tr. 591, 595, 604-06).) But like the efforts to amend the D.C. CJA, they were unsuccessful.[2]

3. Respondents' Pre-Strike Efforts to Secure Legislation Increasing Maximum CJA Compensation Levels

While these efforts were going on, the CJA lawyers themselves were also lobbying for legislation to increase the CJA maximum rates. Their initial efforts were no more successful. "The response from the Mayor and Council members before September, 1982, was almost unanimous support but no concrete results . . . ." (Pet. App. 179a n.127.) In late 1982, against this background of failed attempts to obtain legislation increasing CJA compensation, several lawyers relatively new to CJA practice, including the individual Respondents in this case, renewed their efforts to obtain such legislation. They did so in large part because they thought it was "the single most important thing" they could do to improve the quality of representation provided to indigent defendants. (C.A. App. 156-61 (Perrotta); *see also* C.A. App. 235-40 (Koskoff), 263-67, 474-77, 480-81 (Slight), 450 (Stein), 497-98 (Perrotta), 504-05 (Addison).)

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[2] In October 1984, about a year after the successful conclusion of the D.C. CJA lawyers' strike, legislation was finally passed, increasing the federal CJA hourly rates to $60 for in-court time and $40 for out-of-court time. (Pet. App. 189a-90a n.161.)

These CJA lawyers began by requesting regular monthly meetings with Chief Judge Moultrie of the Superior Court and Larry Polansky, Executive Officer of the D.C. Courts, about a variety of subjects concerning the improvement of the system for representing criminal defendants. (C.A. App. 162, 528.) One of the subjects repeatedly discussed was how the lawyers could go about getting legislation to increase the rates, and whether the Chief Judge would support such an increase. (C.A. App. 163-65, 206-07.) Both Judge Moultrie and Mr. Polansky stated privately that they believed the CJA lawyers deserved an increase. (Pet. App. 179a.) However, the Chief Judge refused to do anything to support it on the ground that he might have to pass on the constitutionality of any legislation. He told the CJA lawyers that they themselves would have to "generate the political support for it," and indicated that they should contact the D.C. government because it was a city problem, not a court problem. (C.A. App. 164, 207.)

The lawyers then sought to meet with the Mayor, but were received only by his counsel, Herbert Reid. Mr. Reid expressed sympathy for their cause, but sent them back to the D.C. Council and/or the Chief Judge. Mr. Reid stated that the Council would have to act before the Mayor could do anything, and noted that it was politically unrealistic to expect the Mayor to support an increase when the Superior Court was not asking for it. (C.A. App. 166-67, 208-10, 217, 529). The Chief Judge continued to refuse to take a position, however, despite repeated requests for public support. (C.A. App. 167, 210-11, 528-29.)

In early 1983, the CJA lawyers began contacting members of the D.C. Council and their aides, starting with Councilmember Wilhelmina Rolark, who chaired the Council's Judiciary Committee, Council Chairman David Clarke, and Councilmember John Ray. (C.A. App. 211; Tr. 805, 808 (Koskoff).) In March of 1983, Council

Chairman Clarke introduced a new bill to increase the hourly rate, and Councilmember Rolark announced that hearings would be held the following June. When the CJA lawyers learned of this bill and the scheduled hearings, they contacted Councilmember Rolark and her counsel, as well as other council members' staffs, other government officials, bar groups, the PDS, and Judge Moultrie to seek support for the bill. (C.A. App. 211-13, 528-29; Tr. 803-08 (Koskoff); JX 13 at 51-52, 173 (Tr. 66) (Koskoff).) They also wrote to the Mayor seeking support. (RX 66 (Tr. 610); Tr. 694 (Perrotta).)

At the hearings, the CJA lawyers submitted written statements and testified orally. (C.A. App. 216, 565-67 (Tr. 310-11), 575-89 (Tr. 311), 826-39 (Tr. 614), 869-76 (Tr. 615).) Although Chief Judge Moultrie refused to testify (C.A. App. 528-29), the PDS and numerous representatives of bar groups testified or submitted statements. (C.A. App. 303 (Pickering), 381-82 (Isbell), 565-69 (Tr. 310-11), 615-21 (Tr. 242), 802-18 (Tr. 611-12), 840-41 (Tr. 614), 876-81 (Tr. 615).) The D.C. Bar, for example, which rarely takes a position on legislation because it is required to obtain a vote of its members to do so, supported the legislation because of "the importance to the Bar, as well as to the public, of the subject now before the Committee." (C.A. App. 802-03 (Tr. 611), 378-79 (Isbell), 880-81 (Tr. 615).) Bar President David Isbell testified that this was one of only two issues in the bar's history on which it had taken such a position. (C.A. App. 881 (Tr. 615).) Not a single witness or submission opposed the bill on its merits. (C.A. App. 174, 216, 381-82, 564-69 (Tr. 310-11), 575-89 (Tr. 401), 802-95 (Tr. 227-28, 611-15).)

Following the hearing, the CJA lawyers spoke with Councilmember Polly Shackleton and with Council Chairman Clarke. (C.A. App. 216.) They also spoke with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the U.S. Senate Committee

on Appropriations, to discuss the possibility of federal funding to increase the level of CJA compensation. Mr. Leeth informed them, however, that Congress was sensitive to the District's Home Rule status and would not support an increase until the District itself had acted, through either a request from the Chief Judge of the Superior Court or a bill enacted by the D.C. Council. (Pet. App. 183a.)

It soon became apparent that the hearings on the Council bill to increase the CJA rates were little more than an empty gesture (C.A. App. 173-75, 203, 249-50, 500-01, 512), and that there was no "political steam" behind the bill. (C.A. App. 394 (Isbell).) An aide to Councilmember Rolark told Respondent Koskoff that passage was extremely unlikely because there was no source of funding. (Tr. 809 (Koskoff).) Under the legislative system in the District of Columbia, the prospects for legislation on matters affecting appropriations are heavily dependent on the Mayor's office because the Council is unable to project anticipated revenues and, consequently, cannot independently assess the impact of legislation on the balanced budget required by the act granting Home Rule. (Tr. 1241, 1244, 1247-48 (testimony of former D.C. Council Chairman Sterling Tucker).) Reflecting the Mayor's influence over such legislation, an aide to Councilmember John Ray told Respondents that (in the words of Respondent Addison) "if the Mayor wants you to have it, he can get it." (C.A. App. 252.) But, as noted above, the Mayor's counsel had told the CJA lawyers that the Council would have to act first. (C.A. App. 208-09.)

4. The Strike

Earlier in the year, the CJA lawyers had received some advice from Wiley Branton, then Dean of Howard Law School, that now seemed particularly appropriate. (C.A. App. 171-72, 213-15, 402-05 (Branton).) Dean Branton was knowledgeable about the local political process, had

served on a task force advising the Mayor on the administration of justice and other matters, was chairman of the D.C. Judicial Nomination Commission, and knew the Mayor and every member of the D.C. Council personally. (Tr. 1376-79 (Branton); C.A. App. 213.) He told the CJA lawyers that the chances for an increase in rates were "very dim," and that they needed to generate political support. (C.A. App. 171-72, 213-15, 404-05.) He explained that the problem was not just a lack of funding, and remarked that "if a billion dollars fell on the District of Columbia tomorrow," the lawyers would still not get their increase. (C.A. App. 511.) He explained that there was no organized constituency to lobby for the increase, and that the criminal defense bar was not held in high enough regard by the government or the public at large to generate support as long as the cases were being handled and the system was running smoothly. (C.A. App. 171-72, 214-15, 409, 495.) As Dean Branton later testified:

> In a nutshell I told them . . . that they were going to have to do something dramatic to attract attention in order to get any relief.
>
> And I probably used an expression, you will have to raise hell about this to attract somebody's attention.

(C.A. App. 410.)

In the course of the meeting with Dean Branton, it was mentioned that some CJA lawyers were thinking of a strike to draw public attention to the problem, and Dean Branton indicated that "it may well have to come to that." (C.A. App. 411.) No serious consideration was given by the CJA lawyers to a strike at that time, however, because the lawyers were still hopeful that legislation might be passed by the D.C. Council. (C.A. App. 215.)

After the Judiciary Committee hearings had come and gone with neither substantive opposition nor apparent

progress, however, a number of the CJA lawyers finally concluded that dramatic action was needed to attract public and legislative support. On August 11, 1983, they decided on what they called a "strike"—*i.e.*, they would cease calling in to the CJA offices to volunteer for new appointments.[3] Unlike a classic strike, however, their refusal to volunteer for new appointments did not involve a complete work stoppage. The lawyers continued to handle cases to which they had already been appointed, believing that they "had an absolute duty" and "a moral and a legal obligation and an ethical one to continue representing the people that [they] already represented." (C.A. App. 187, 515b; Tr. 884-85 (Addison), Tr. 962 (Slaight), Tr. 643 (Perrotta).) Moreover, although most of the lawyers stopped calling in to volunteer for new matters, "[n]o one ever refused an appointment." (C.A. App. 515b (Tr. 66).) Respondent Koskoff, for example, accepted a new case for an existing client at the request of a judge, though she declined appointment under the Criminal Justice Act and represented the client *pro bono* instead. (C.A. App. 229-30.)

As with their lobbying efforts generally, a major motive of the strike was to improve the quality of CJA representation. (Pet. App. 226a-27a.) Although most of the lawyers also stood to gain economically from a rate increase, this was not universally true. Respondent Slaight had at the time already formed an intention to

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[3] C.A. App. 515b-16 (Tr. 66). The message of the strike, according to one of the Respondents, was:

> [T]he system had sold our clients out—indeed had sold us out—by saying . . . all we want is to meet the constitutional requirement that you have a lawyer, and that we don't really care what kind of job you do.
>
> So what we said essentially is, we will no longer be a party to the system's desire to only have a warm body beside you. And that, in fact, we cannot in good conscience continue to take cases under the present circumstances.

(C.A. App. 504 (Addison) (Tr. 66).)

leave CJA practice and had stopped taking new appointments. She participated as a leader of the "strike" because she believed "it was the right thing to do" and "felt [she] was doing more for [her] clients by supporting the increase in legislation than [she] had done for the last two and a half years [representing clients under the CJA]."[4] Other CJA lawyers felt that higher rates would be economically detrimental to them because so many new lawyers would be drawn to taking CJA cases that it would make it difficult for lawyers that wished to make a living at CJA work to get enough cases to do so. (C.A. App. 498.)

The strike was scheduled to commence on September 6, several weeks after it was announced. The early announcement, coupled with the fact that many CJA lawyers increased their caseloads in advance of the strike, allowed PDS to reduce its caseload and take other actions in preparation for the strike. (*See* C.A. App. 107-08, Tr. 92, 96-97, 110-12 (Carter); C.A. App. 141-42 (Robinson).)

On August 29, between the announcement and commencement of the strike, several of the lawyers met with the Mayor. The Mayor stated that he supported the legislation, that an increase was long overdue, and that CJA lawyers did useful work at extraordinarily low rates. (C.A. App. 176.) He discussed in general terms how the bill might be funded and explained the District's emergency legislative authority, saying that "if an emergency arises I will have to deal with it." (C.A. App. 176-77, 222-23, 495-96, 507-08.) Respondent Koskoff had never heard of emergency legislation until the Mayor brought

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[4] C.A. App. 265-67. She subsequently returned to CJA practice after a stint at a public interest organization in New York. Two of the other three individual Cross-Petitioners, Ms. Koskoff and Mr. Perrotta, left CJA practice shortly after the events in question, reflecting the often rapid turnover among those regularly taking CJA cases (particularly among the younger lawyers).

it up. (C.A. App. 223.) The overall impression conveyed at the meeting, according to Respondent Perrotta, was:

> If I don't have an emergency I can't respond in any kind of emergency way.
>
> . . . [I]t is almost like theater. He has to be able to come in as the rescuer, the man on the white horse and say, well, I am going to solve this huge crisis in the court system . . . .

(C.A. App. 495-96.) The meeting ended with the Mayor smiling directly at Respondent Koskoff and saying, "[Y]ou do what you got to do and I will do what I got to do." (C.A. App. 223-24.) After the meeting, the Mayor and the lawyers held a press conference, which resulted in publication of an article on CJA funding in the *Washington Post*. (C.A. App. 224, 899 (Tr. 616).) The Mayor described himself as "sympathetic" and said that he would discuss with Council members the possibility of providing funds for a raise. But he declared, "My action has nothing to do with what they may or may not do in September." (C.A. App. 899 (Tr. 616).)

The CJA lawyers actively sought media coverage of the strike to create public awareness and support. (C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27.) A public relations coordinator was designated, two press information kits were prepared, and SCTLA leaders were encouraged to seek out journalists. (Pet. App. 194a; C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27; Tr. 919-25 (Kline); CX 6-C-J, 13 (Tr. 310-11); RX 97 (Tr. 923); RX 106-A-C (Tr. 618).) The strike was covered widely, not just on Washington television and in local papers, but on national network news, in the *New York Times*, *USA Today*, and *The Economist*. (*See* C.A. App. 900 (Tr. 626), 921-22, 930, 954 (Tr. 619).) The strike generated favorable editorials, including one by the *Washington Post* (C.A. App. 934 (Tr. 619)) and an op-ed article by Harold H. Greene,

former Chief Judge of the Superior Court, who urged: "These lawyers should receive the modest increase they have requested." (C.A. App. 946 (Tr. 619).) The strike also led Chief Judge Moultrie for the first time to state *publicly* that he supported an increase in rates. (C.A. App. 396-97, 948 (Tr. 619), 955 (Tr. 621).)

The strike by CJA lawyers commenced on September 6, 1983, as CJA lawyers had earlier announced it would, and it ended on September 20, two weeks later. (Pet. App. 193a, 204a-05a.) During the strike, newly arrested indigent criminal defendants were represented by PDS attorneys, a dozen CJA regulars, volunteers from the private bar, and law students. (Tr. 96-98, 101-02, 190-97, 222-23 (Carter); Tr. 338-39 (Robinson).) According to petitioner's own witness, proceedings in the Superior Court were conducted at their normal pace (Tr. 561 (O'Neill)), apart from presentments and arraignments, which required an extra hour or so each day to process. (Tr. 568-69, 573-74 (O'Neill).) Although one or two "citation" cases were briefly continued,[5] not a single indigent accused was denied legal representation during the strike. (*See* Tr. 103, 223-25 (Carter).)

5. Passage of Bill No. 5-128

On September 15, in the strike's second week, Frank Carter, Director of PDS, wrote letters to the Mayor, Chief Judge Moultrie, and D.C. Council Judiciary Committee Chairwoman Rolark stating that by the next week, difficulties in providing counsel would "reach a crisis point." (CX 31-A, 32-A, 33-A (Tr. 106).) The letter

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[5] "Citation" cases involve misdemeanor offenses such as petty theft and traffic violations. In such cases, trustworthy defendants are released on their own recognizance directly from the precinct after a telephone interview and approval by the pretrial services agency. At the time of release, they are assigned a date to appear in court two or three weeks after their arrest dates. (Tr. 103, 223-25 (Carter).)

also noted the widespread support for the pending bill to increase D.C. CJA rates by PDS and others, and urged the Mayor, Chief Judge Moultrie, and Councilmember Rolark to declare their unified support for the bill. (CX 31-B-C, 32-B-C, 33-B-C (Tr. 106).)

Mr. Carter testified that a principal purpose in writing the letters was to prompt all three branches of government to take immediate action to secure passage of Bill No. 5-128, pending before the Council. (C.A. App. 119-20.) Mr. Carter wrote the "crisis" letters in the context of the "status quo" (C.A. App. 119)—that is, they were predicated on the assumption that nothing further would be done by PDS or the court to get additional volunteers or to compel non-volunteers to take appointments. (C.A. App. 119-24.) At the time, PDS had contacted only a fraction of the law firms and lawyers who might have provided assistance,[6] and a number of lawyers who had handled cases during an earlier 1974 strike testified that attorneys in their firms would have volun-

[6] Prior to the strike, PDS contacted only about 15 of the 40 firms on the D.C. Bar's *pro bono* list in seeking volunteer assistance. (C.A. App. 110-11 (Carter).) In addition, PDS contacted several former U.S. attorneys and former PDS attorneys and approximately 25 to 30 attorneys who accepted appointments during prior emergencies. (C.A. App. 111 (Carter); Tr. 335 (Robinson).) PDS did not seek volunteer assistance from the remaining 25 firms on the bar's *pro bono* list until two days before PDS reached a decision to write the "crisis" letters, with the result that the "crisis" letters were written before PDS knew the extent of additional volunteer assistance that would be available. (C.A. App. 117-19 (Carter).) PDS also did not solicit assistance from firms not on the list, many of which had extensive litigation practices and had provided attorneys in prior emergencies. (C.A. App. 122-23 (Carter).) Nor did PDS request the D.C. Bar to help mobilize volunteer assistance, although Mr. Carter of PDS appeared at a Board of Governors meeting of the bar on September 13. (C.A. App. 118, 123-24, 311-12.) PDS was aware that there were substantial additional sources of volunteer assistance which could have been utilized to avert a "crisis" if the strike persisted. (*See* C.A. App. 120-24 (Carter).)

teered for cases if asked to do so by PDS. (C.A. App. 332-33 (testimony of James F. Rill), 340-42 (testimony of Edward J. Lopata), 371-73 (testimony of James R. Loftis).) Similarly, the court had not exercised its power to order members of the bar (including striking CJA lawyers) to accept appointments.[7] Indeed, some of the CJA lawyers had expressed the view beforehand that if the court chose to exercise this power, it could break the strike. (C.A. App. 451-52.)

The PDS letter provided a basis for the D.C. government to act and to invoke its emergency legislative powers. On September 15, the Mayor called Respondent Kos-

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[7] There is no dispute that the court had the power to order the 14,000 members of the bar in private practice in the D.C. area to take appointments. (C.A. App. 127-30.) During an earlier strike in 1974, the court exercised this power to provide counsel for over two months, a far longer period than the two weeks involved in this case. (C.A. App. 125-27 (Carter), 422-28 (Lefstein).) If ordered to appear, large numbers of private attorneys, pursuant to their obligations as officers of the court, would have done so, as they had in the past. (C.A. App. 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill), 342 (Lopata), 373 (Loftis).) While the ALJ found that a mandatory *pro bono* program relying on involuntary court appointments would not have been a satisfactory permanent replacement for reliance on voluntary CJA practioners (Pet. App. 158a-60a), uncontradicted expert testimony indicated that a system of court-ordered appointments could have kept the system operating for several months to a year. (C.A. App. 428-29 (Lefstein).) Such a system of appointments resulted in a high quality of representation during the 1974 strike. (RX 55-Z4 (Tr. 608).) The record is also clear that while a substantial percentage of the attorneys sent appointment orders in 1974 did not appear on the date of their notice, very few simply ignored the orders. Rather, because they were given very short notice, a large number notified PDS that they were willing to accept cases but needed their appearance dates continued because of scheduling conflicts. (C.A. App. 422-25 (Lefstein).) The "overwhelming majority" either appeared or were willing to appear. (C.A. App. 434.) Despite these scheduling conflicts, the 1974 "draft" produced enough attorneys to operate the criminal justice system for an extended period until new CJA funds were obtained. (*Id.*)

koff and requested a meeting that evening with her and Respondents Perrotta and Addison. (C.A. App. 231.) "The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott." (Pet. App. 200a; *see* C.A. App. 189-90, 232, 487.) The Mayor explained that since an emergency now existed, the bill could be passed as emergency legislation. (C.A. App. 232-34.) He explained the legislative schedule and stated that he would sign the bill promptly. (C.A. App. 192-93, 232-34, 487-89.) The CJA lawyers asked him when they should return to work, and he responded that "as an old organizer," he would advise them to do so only after the first reading of the bill. (C.A. App. 193, 234, 487-89, 521-22.)

The Mayor wrote to Councilmember Rolark the next day, September 16, stressing "the importance of quality representation for indigent defendants," expressing his support for the pending legislation, and stating that he would "ensure that the courts have adequate resources to cover the increased costs." (Pet. App. 201a-02a.)[8] On

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[8] The letter reads in part as follows:

> [B]ecause I believe in the importance of quality representation for indigent defendants and appreciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.
>
> As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.

(Pet. App. 201a-02a.)

the same day, the Mayor arranged for some of the Respondents to meet with Council Chairman Clarke and Councilmember Rolark. Chairman Clarke conditioned action by the Council upon a vote by the CJA lawyers to end the strike. (Pet. App. 204a.) A favorable vote was taken by the lawyers on September 19; the Council approved the bill unanimously the next day. (Pet. App. 204a.) The Mayor signed the bill, stating in a press release that he did so because "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District." (C.A. App. 961 (Tr. 623).) Three of the Respondents were invited to attend the signing and the cocktail reception that followed. (C.A. App. 193-94, 240, 961 (Tr. 623).)

6. Effects of the Legislation

The increase in the maximum rates under the D.C. CJA resulted in a dramatic increase—approximately a doubling—in the number of attorneys seeking CJA appointments each day as compared with the period before the strike. (C.A. App. 140, 143, 161, 201-02.) Approximately 75 new attorneys not registered with the CJA Office before the strike registered to take appointments between the passage of the bill and the time of hearing. (Tr. 255-56 (Carter); RX 168 (Tr. 1230).) Other attorneys who had previously registered to take CJA cases, but who had reduced the number they were taking or had dropped out of the program entirely before the strike, returned to become active CJA practitioners. (Tr. 858 (Koskoff).) Experts and participants in the system testified without contradiction that the increased rates would improve the quality of legal services provided to indigent criminal defendants. (C.A. App. 160-61, 254-56, 497-98; Tr. 1539-40 (Lefstein); Tr. 1153-54 (Hazard); Tr. 726, 728-29 (Perrotta).)

7. The Political Functions of the Strike

At the hearing before the Administrative Law Judge, there was extensive testimony concerning the political functions of the strike. Then-Bar President David Isbell described the strike as "an effort directed toward bringing effective public attention to the problem of inadequate compensation," and Dean Branton described it as "a form of lobbying" to which the lawyers were "driven . . . because of the economic plight they found themselves in." (C.A. App. 385, 416.) John H. Pickering, who was immediate past president of the D.C. Bar at the time of one of the major study group reports, similarly described the strike as a form of lobbying, noting that its success "simply indicates that eventually everybody understood that there was a legitimate grievance here that impacted severely on the administration of justice and it was time to do something about it." (C.A. App. 293, 309-10.)

There was also uncontroverted testimony at the hearing linking the strike, media coverage, and petitioning efforts. For example, Professor Robert H. Salisbury, a professor of political science at Washington University in St. Louis and an expert on interest group politics (Tr. 979-81), explained that "media coverage is absolutely vital" for those who lack the resources necessary to influence legislation directly and must mobilize public attention. (C.A. App. 285.) Sterling Tucker, former chairman of the D.C. Council, testified that D.C. government officials and Council members regarded the media "as very important in establishing public opinion, building public support, influencing the outcome of decisions, [and] affecting the decision making process generally in and out of government." (C.A. App. 356; *see also* C.A. App. 353-55.) There was also expert testimony that "direct action" is often the only way of attracting media attention for groups lacking status and prestige, and that boycott-like actions are often far better ways of obtaining continuing attention than other actions such as demonstrations. (C.A. App. 285-88 (Salisbury).)

Mr. Tucker also explained why both legislators and strikers would be particularly likely to view the strike as political in the District of Columbia. Noting that most members of the D.C. Council itself had personal experience with "direct action" in the period before Home Rule (C.A. App. 344-50), he stated:

> We have been a part of the civil rights movement. We have been a part of the movement to achieve justice and to acquire [services] in this community. . . . And it is one of the strategies to produce change and we regarded it or I regarded it as such and I am sure that my colleagues did. As a matter of fact, there was never any discussion about it particularly because we just accepted it. That was practically true of all members of the council, including the current Mayor. And I think that probably people in Washington feel and felt freer to use tactics of various kinds and strategies which to some might appear extreme because . . . they know that we understood both the philosophy of such strategies as well as the actions of such strategies. And so they knew that we wouldn't be intimidated by it. I wouldn't regard it as particularly unusual.

(C.A. App. 349-50.)

8. The Proceedings Below

Following a three-week hearing, the Administrative Law Judge filed an initial decision recommending dismissal of the complaint. (Pet. App. 229a.) The FTC, with two members not participating,[9] reversed, holding that the strike was a *per se* antitrust violation under the standards of Section 1 of the Sherman Act, and, in the alternative, an unreasonable restraint of trade if judged under a truncated rule of reason. (Pet. App. 86a-98a.) The Court of Appeals, in turn, reversed and re-

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[9] Pet. App. 68a. The FTC's brief is thus quite correct in twice referring to the decision as "unanimous" (FTC Br. 6, 14), since three votes are required for the Commission to issue a final order.

manded for a determination of whether the striking CJA lawyers possessed market power. While rejecting Respondents' contention that the strike was not within the scope of the antitrust laws under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), (Pet. App. 32a-45a), the court held that where the "special concern of the First Amendment with efforts to petition the government for redress of one's grievances" was at stake, a presumption of anticompetitive effect without proof of market power was more restrictive than essential to furtherance of the government's interest and thus ran afoul of the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). (Pet. App. 47a-51a.)[10]

The FTC's petition for reconsideration and suggestion for rehearing *en banc* was denied on October 25, 1988. On January 23, 1989, the FTC petitioned this Court for certiorari and on February 22, 1989, Respondents cross-petitioned for certiorari. This Court granted certiorari on both petitions on April 17, 1989.

SUMMARY OF ARGUMENT

The record in this case establishes beyond question that the CJA lawyers' strike constituted petitioning of a legislature and served the traditional functions of such petitioning. As such, it implicates important First Amendment values which, under standard principles of statutory construction, should not be invaded unless the clear intent of Congress permits no other course. Through the *Noerr* doctrine, this Court has already construed the

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[10] In view of this disposition, the Court of Appeals did not rule on the CJA lawyers' contention that, even if a violation could be found, the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. Should this Court reverse the Court of Appeals on the basis asserted by the FTC, remand to the Court of Appeals for a determination on this issue will be required.

Sherman Act not to reach conduct whose context and nature establish that it is political rather than commercial. That doctrine is fully applicable here: the strike was open and, indeed, highly publicized; it was directly aimed at generating media attention and creating the political climate necessary for the legislature to act; the government officials that were the ostensible targets of the strike made no attempt to discourage the strikers, but instead made clear that action of that kind was necessary to enable them to pass the legislation without incurring undue political risk; and the government retained at all times the power to end the strike, as the strikers were fully aware. In these circumstances, the court below should have required dismissal of the complaint, and insofar as it failed to do so, its decision should be reversed.

Because dismissal should be required without regard to market power, it is not necessary for this Court to reach the questions presented in the FTC's petition in No. 88-1198. If those questions are reached, however, the Court should affirm the Court of Appeals' holding that the CJA lawyers' strike could not be condemned without a showing of market power. That holding may be affirmed on statutory grounds, for a legislative petitioning boycott is not the kind of conduct that almost inevitably has a pernicious effect on competition and lacks any redeeming virtue. The conditions for applying the *per se* rule are therefore not present. Moreover, because a legislative petitioning boycott by parties without market power cannot be economically coercive, such a boycott falls squarely within the policy of *Noerr*.

Alternatively, the decision of the court below may be affirmed on the First Amendment grounds on which it rested. Application of a *per se* rule to the CJA lawyers' strike would restrict political petitioning and expression far more broadly than reasonably necessary to further the governmental interest in protecting competition, and thus must be struck down under the standards announced in

cases such as *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989) and *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1989).

The FTC also argues that, even assuming market power must be shown, it may satisfy that burden by a "truncated" rule of reason that relies on the mere fact that the lawyers succeeded in getting the legislature to increase the price for the services they provided. Applying a "truncated" analysis to these facts, however, would ignore the very reason for using a rule of reason in the first place. The FTC's question-begging analysis cannot be accepted.

ARGUMENT

I. THE CJA LAWYERS' STRIKE IS BEYOND THE SCOPE OF THE SHERMAN ACT

A. The Strike Constituted Petitioning and Served the Traditional Functions of Petitioning

It is axiomatic that a statute should be interpreted to avoid potential constitutional problems unless such an interpretation is contrary to the plain intent of Congress.[11] In keeping with this principle, this Court held in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), that genuine efforts to petition the legislature are not within the scope of the Sherman Act,[12] even if the techniques used are indirect and even if they result in incidental direct anticompetitive effects in the marketplace. In so holding, the Court observed that the "right of petition is one of the freedoms pro-

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[11] *Gomez v. United States*, 57 U.S.L.W. 4643, 4644 (U.S. June 12, 1989); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

[12] The FTC concedes that Section 1 of the Sherman Act, 15 U.S.C. 1, controls its decision. (FTC Br. 5-6 n.7). Accordingly, the relevant antitrust statute in this case is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-55 (1986).

tected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The reach of the *Noerr* doctrine depends, of course, on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). The FTC contends that the nature of Respondents' conduct is such that it implicates no First Amendment values whatsoever. In the opinion accompanying its order, the FTC declared that the strike constituted "disruption of the normal channels of government decision-making . . . wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it." (Pet. App. 122a.) Similarly, the FTC maintains here that the strike is not speech at all, let alone political speech, and thus does not warrant even the limited protection accorded by *United States v. O'Brien*, 391 U.S. 367 (1968). (FTC Br. 25-26.) Legislation has been likened to a dance,[13] but the FTC evidently sees no element of choreography here; it finds incomprehensible, and therefore declares nonexistent, a process in which the executive and virtually all of the legislators can agree on the need for a particular measure, yet require an elaborate direct-action campaign, complete with striking lawyers, picket lines, press releases, and television crews, to mobilize the political support necessary for its passage.

Contrary to the FTC's position, however, the record in this case leaves no doubt that the strike constituted legislative petitioning and served the traditional functions of such petitioning. Witness after witness testified about the petitioning functions of the strike (*e.g.*, C.A. App. 270-92 (Salisbury), 308-10 (Pickering), 343-51, 353-62 (Tucker), 384-85, 398-99 (Isbell), 414-16 (Branton); *see also* C.A. App. 182-88 (Perrotta), 227-29 (Koskoff),

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[13] *See generally* E. Redman, *The Dance of Legislation* (1973).

253-54, 509-10 (Addison), 451-52 (Hirsch), 461-62 (Pickens)), and not a single witness contradicted them. As Respondent Perrotta observed, the strike was "an opportunity for the community at large beyond the handful of leaders whom we had seen, to respond to our request and to react to it." (C.A. App. 184.) Not only did it give columnists and writers of letters to the editor an opportunity to express their opinions, but

> [t]here was an opportunity for Harold Greene, former Chief Judge of the Superior Court to express himself and there was an opportunity finally even for Judge Moultrie who was so sensitive about potential conflict that he faced [to express an opinion].
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> * * * *
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> Judge Moultrie [had] never asked for the money. Finally Judge Moultrie asked for the money in a sense and I think the Mayor is in a position at that point to say, well, now I know that the community is really behind this, everybody is behind it. No one came out against it.

(C.A. App. 185-86.)

The strike also permitted the Mayor and Council members to test the public reaction without unnecessarily risking political capital:

> [F]or all that the Mayor knew in advance, the reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city.
>
> The reaction might have been the crime rate is already so enormous . . . .
>
> There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense.

(C.A. App. 186-87 (Perrotta).)[14]

Indeed, although the ALJ felt bound by prior FTC precedent to reject Respondents' *Noerr* defense, he could only conclude after surveying this record:

> city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (i.e., constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly against pressing for an unnecessary and possibly uncertain confrontation be-

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[14] The "testing the waters" function of the strike demonstrates the irrelevance of the ALJ's finding that "there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure." (Pet. App. 194a.) It is unclear what the ALJ meant by "public pressure," since he found, at the same time, that the strike "did attract media attention and editorial support." (*Id.*) Such support was of major political significance, whether or not it constituted "pressure."

It was thus unnecessary, although clearly correct, for the court below explicitly to decline to credit the ALJ's finding concerning public pressure on the ground that it was not specifically adopted, and was therefore rejected, by the Commission. (Pet. App. 54a.) It is also unnecessary to invoke the principle that a reviewing court must examine the evidence critically where there is otherwise a risk that liability will be imposed for constitutionally protected conduct, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982), although that principle would clearly be applicable if the ALJ were taken to mean that there was not a significant outpouring of media support. That finding, which the ALJ did *not* make, would have been contrary to the uncontroverted evidence. (C.A. App. 182-88, 285-88, 353-56, 509-10, 921-54 (Tr. 619).)

> tween the Commission's antitrust perspective . . . and broader constitutional principles . . . .

(Pet. App. 227a.)

It is thus clear on the record that the CJA lawyers' strike served the traditional functions of petitioning, and was so perceived by those whose judgments ought to matter most—those being petitioned.[15]

B. The Political, Legislative, and Petitioning Context and Nature of Respondents' Conduct Demonstrate that the Strike Falls Within the Scope of the *Noerr* Doctrine

The court below avoided the FTC's error of assuming that the strike implicated no First Amendment value at all. It acknowledged that "[u]nlike *Allied Tube*, the relevant conduct here did take place in a political context —the legislative arena . . . ." (Pet. App. 37a.) Because the activity in question constituted a "concerted refusal to deal by competitors," however, the court believed that the "nature" of the activity foreclosed *Noerr* treatment. *Id.*

Such use of labels ignores the careful, context-specific approach taken by this Court in *Allied Tube*. That case involved the packing of a meeting of a private standard-setting organization with new members "whose only func-

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[15] The petitioning functions of a boycott have previously been recognized by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982). This Court there observed that a boycott staged to influence governmental action implicates speech, assembly, association, and petitioning protected by the First Amendment. 458 U.S. at 911. The Court recognized a broad "right of the States to regulate economic activity," but held that it "could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. The complete prohibition against politically motivated boycotting which the FTC seeks in this case would trench upon First Amendment values no less.

tion would be to vote against" a competitor's proposal. 108 S. Ct. at 1935. The conduct "did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process." *Id.* at 1940. Although the code established by that organization did have an indirect legislative impact in that many state and local governments routinely adopted the code into law with little or no change, it also had direct competitive effects in that the code directly influenced the commercial practices of private certification laboratories, underwriters, electrical inspectors, contractors, and distributors. *Id.* at 1934. In these circumstances, this Court characterized the conduct as "commercial activity with a political impact," and therefore outside of *Noerr*. *Id.* at 1941. Noting, however, that it is

> difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact,

id. at 1941 n.10, the Court cautioned that "our decision today depends on the context and nature of the activity." *Id.* And even the packing of a private standard-setting meeting was found to be "close to the line." *Id.*

Unlike *Allied Tube*, the conduct here was open and notorious, and, indeed, publicity was a central motive and feature of the strike. That alone should counsel caution in applying the antitrust laws. If actions are taken openly, legislatures have ample means at their disposal to control conduct that they believe harmful to the proper functioning of the political process [16] without resorting to

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[16] Congress has done so, for example, in the federal election laws. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (upholding in part and striking in part provisions of the Federal Election Campaign Act). In the instant case, the D.C. Council could have used the long period between the strike announcement and its implementa-

a statute tailored, not to that end, but to protecting the functioning of commercial markets.[17] The legislative process is, by nature, rough-and-tumble; as this Court observed in *Noerr*, "no-holds-barred fight[s] . . . are commonplace in the halls of legislative bodies . . . ." 365 U.S. at 144; *see also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (contrasting the scope of acceptable conduct in the legislative and adjudicatory arenas).

Moreover, the special circumstances of this case make clear that the CJA lawyers' strike, unlike the meeting-packing scheme in *Allied Tube*, is far from "close to the line," but instead was very clearly political in nature. The strikers were given the unmistakable political message that they would have to "do something dramatic" to develop support for the legislation. When they announced their strike, the Mayor did not discourage them, but instead told them "you do what you have to do," and explained how the emergency legislative process worked. (Pet. App. 187a.) The lawyers were subject to the full power of the Superior Court, which could have ordered them to take cases. (*See supra* p. 16 n.7.) Indeed, Respondent Koskoff took a case *pro bono* at a judge's request. (C.A. App. 229-30.) Instead of exercising com-

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tion to put substantial pressure on the CJA lawyers. A proposal for a large increase in the PDS appropriations, for example, could have raised the spectre of a major, long-term reduction in the need for CJA services, thus threatening the livelihoods of many of the CJA lawyers. A similar effect might have been achieved had either the Council or the Superior Court instituted a "draft" of lawyers—or even if PDS had undertaken more vigorous efforts to obtain volunteers—thus showing the lawyers that the battle would be a protracted one.

The fact that such tools are available to a legislature demonstrates the speciousness of any suggestion that application of the *Noerr* doctrine to public, petitioning boycotts directed at a legislature would lead to dire consequences. *See infra* pp. 40-42.

[17] *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491-97 (1940).

pulsion, "several judges went out of their way to volunteer . . . how pleased they were at [the lawyers'] success." (C.A. App. 187 (Perrotta).) The PDS announced an imminent "crisis" at a time when it had contacted only a fraction of the law firms that might have offered help, and the director of PDS admitted on the stand that one of the principal purposes of doing this was to prompt all three branches of government to take immediate action to pass the legislation in question. (C.A. App. 119-20 (Carter); *see supra* p. 15 & n.6.)

The ALJ described this case as one in which the strikers had the D.C. government's "knowing wink." (Pet. App. 226a.) Though this is an accurate description of the record, it may have been an unfortunate phrase, one which may have led astray both the FTC and the court below. The FTC, for example, cites *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940), for the proposition that a "knowing 'wink' . . . of government employees or other boycott targets" [18] does not bear on a boycott's legality. (FTC Br. 44 n.40.) That argument misses the point. While a government official may not grant an exemption from the antitrust laws that Congress has not authorized, the perception of government officials—especially elected officials—that they are being lobbied rather than coerced certainly casts light on whether the conduct is "political" within the meaning of *Allied Tube*. Just as "a good intention will [not] save an otherwise objectionable [restraint]," yet is relevant where it "help[s] the court to interpret facts and to predict consequences," [19] so too the fact that D.C. officials recognized

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[18] Of course, *Socony* had nothing to do with boycott targets, governmental or otherwise; the Court was simply denying government officials the ability to grant unauthorized exemptions from the antitrust laws with respect to ordinary conspiracies to restrain competition in commercial markets. *See* 310 U.S. at 226-27.

[19] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

and encouraged the political uses of the strike is surely germane to the political "context and nature" *Allied Tube* makes dispositive.

Allied Tube counsels us to consider the *entire* context and nature of the challenged activity. *See* 108 S. Ct. 1939-42 & nn.10, 11. Through this lens, the CJA lawyers' conduct was clearly a "publicity campaign directed at the general public, seeking legislation." *Allied Tube*, 108 S. Ct. at 1936, citing *Noerr*, 365 U.S. at 140-41. As such, it is not reached by the Sherman Act.

II. EVEN IF THE SHERMAN ACT WERE TO REACH RESPONDENTS' STRIKE, SUCH A STRIKE COULD NOT BE CONDEMNED WITHOUT A SHOWING OF MARKET POWER

A. The Antitrust Laws Do Not Reach Petitioning Conduct By Persons Without Market Power

Although the Court of Appeals concluded that the antitrust laws encompass economic coercion of governmental action, and therefore could in principle reach a petitioning boycott, it held that condemnation of the CJA lawyers' strike under the *per se* rule was a broader restriction of First Amendment activity than necessary to further the government's interest in preserving competition, and therefore was forbidden by the First Amendment. (Pet. App. 45a-51a.) In this latter holding, the court was correct, as we explain *infra* at pages 42-46. However, in keeping with the principle that the Court should not reach the constitutional issue if a reasonable construction of the statute will avoid it, we first explain why the *per se* rule should not be applied in this context as a matter of statutory construction.

1. *Conduct Designed Only to Secure Legislation Cannot Be Presumed to Have a Pernicious Effect on Competition and to Lack Any Redeeming Virtue*

This Court has repeatedly emphasized that the *per se* rule should be reserved for those restraints that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . without elaborate inquiry . . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).[20] A presumption of this kind is reasonable "when surrounding circumstances make the likelihood of anticompetitive [effect] so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984).[21] As the court below observed, such *a priori* judgments "may occasionally be overinclusive, condemning the ineffectual with the harmful"; but this overbreadth is tolerated because the types of arrangements so condemned "rarely, if ever, have redeeming virtues." (Pet. App. 49a.)

The basic reason for outlawing cartels and similar "naked" restraints on price or output is that "[i]n the absence of legal impediments, competitors will often join together in the hope of restricting output and achieving higher prices," much as a monopolist would. P. Areeda, *Antitrust Analysis* 322 (3d ed. 1981). The high price, in other words, is a result of the restricted output, and it can be formally demonstrated that the result is a loss to overall consumer welfare. *See id.* at 13-17.

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[20] *Accord Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

[21] *Accord Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 n.25 (1984).

The presumption of such a loss cannot be justified, however, in the case of conduct intended to generate public support for legislation. In such a case, the predominant effects upon consumers flow from governmental action, and are likely to be quite different from those usually associated with a cartel. In this case, for example, there is no "demand" for CJA lawyers' services apart from the constitutional command of the Sixth Amendment and the decisions of legislatures, executive branch officials, and courts implementing that command.[22] "Demand" is therefore in large part a function of *political* choices and of the political processes by which those choices are made. If the strike succeeded by triggering public discussion and creating the political climate necessary for the bill's passage, then it had its effect by a politically-driven increase in *demand* for improved quality rather than by a restriction in *supply* by a cartel. To apply a *per se* rule would be to deny that possibility and to insist that, in every case, the effect must be presumed to flow from a cartel-like restriction. Nothing

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[2] The FTC persistently ignores the role of the legislative and executive branches in fulfilling the Sixth Amendment guarantee, arguing that the record fails to show that the pre-boycott rates resulted in significant Sixth Amendment violations. (*See* FTC Br. 22-24.) The issue here, however, is not whether Respondents have proved, at a hearing before an Administrative Law Judge of the FTC, that there have been widespread violations of Sixth Amendment rights, but whether the judicially-created *per se* rule should be used to foreclose a form of communication seeking to vindicate such rights legislatively. The strikers—and "every expert who had studied the problem" (Pet. App. 225a, 227a; *see also* Pet. App. 170a-78a)—*believed* that Sixth Amendment rights were at stake. This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), imposed no requirement that systematic violations of the constitutional rights of blacks in Claiborne County, Mississippi be proved in court as a prerequisite to political action. The FTC seems to envision a vastly diminished role for the legislature in protecting constitutional rights—a world in which constitutional rights could be vindicated *only* in the courts.

in the antitrust laws requires so constricted a view of how political processes work.[23]

The FTC's repeated incantation of the term "price-fixing" [24] does not change this analysis. As this Court has observed, "easy labels do not always supply ready answers." *Broadcast Music*, 441 U.S. at 8. One can dispute whether the governmental action in this case flowed from persuasion or coercion—and, indeed, that is what the Court of Appeals' market power test was designed to sort out. One *cannot* dispute, however, that the only

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[23] The noted economist Albert O. Hirschman, whose name is well-known to antitrust practitioners as part of the Herfindahl-Hirschman index, once remarked on the aversion of economists to the "messy" concepts needed to understand the political sphere:

> [V]oice [political expression] is just the opposite of exit [individual decisions to stop buying or selling a product]. It is a far more 'messy' concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, 'secret' vote in the anonymity of a supermarket; and finally, it is direct and straightforward rather than roundabout. Voice is political action par excellence.
>
> The economist tends naturally to think that his mechanism is far more efficient and is in fact the only one to be taken seriously . . . .
>
> * * * *
>
> [T]he decision to voice one's views and efforts to make them prevail are contemptuously referred to . . . as a resort to 'cumbrous political channels.' But what else is the political, and indeed the democratic, process than the digging, the use, and hopefully the slow improvement of these very channels?

A. Hirschman, *Exit, Voice, and Loyalty* 16-17 (1970).

[24] FTC Br. (I), 10, 11, 12, 13, 14, 16, 17, 23, 24, 26, 28, 29, 32, 35-36, 37 n.34, 39 n.36, 40, 42, 43, 44, 45. A notable example of characterization-by-calling-it-so is the first heading in the FTC's argument: "THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT." (FTC Br. 14.)

effect on *price* in the "market" for legal services for indigent criminal defendants flows solely from governmental action, since the price is fixed by statute. That effect on *price* cannot be what this case is about. *See Parker v. Brown*, 317 U.S. 341 (1943). Rather, the issue is whether either the Sherman Act or the *per se* rule reaches the way in which that governmental action was achieved.

We explained in Part I why the Sherman Act does not, in fact, reach the way in which the governmental action was achieved. But even if the Sherman Act were to reach such conduct, and even if "coercion" of the governmental desire for increased quality of representation could be treated as an anticompetitive effect, there would be no *a priori* reason to assume that the CJA lawyers' strike succeeded through such "coercion" rather than through publicity and persuasion. As the concurring opinion below pointed out, "a boycott . . . [can] be either expressive or coercive," and the issue "is determining whether [the lawyers] in fact prevailed because of political appeal or commercial might." (Pet. App. 58a.)

The perversity of conclusively presuming anticompetitive effect, purpose, or coercion in the case of a petitioning boycott is graphically illustrated by this case. The Superior Court had the power to order any of the 14,000 active members of the D.C. Bar in private practice—including the 100-odd strikers themselves—to accept appointments under the Criminal Justice Act.[25] Although it appears that the judges generally refrained from appointing or even requesting the strikers to take cases,[26]

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[25] *See supra* p. 16 n.7.

[26] This may be because the strikers apparently enjoyed considerable support among the judges. Quite a number of the judges attended the CJA lawyers' press conference on the first day of the

one of the individual Respondents took a case during the strike, *pro bono*, at the request of a judge. (C.A. App. 822-23 (Koskoff).) Another stood to gain nothing from increased rates because she had already stopped taking cases in anticipation of leaving CJA practice, yet served as one of the leaders of the strike because she thought it was the "right thing to do." (C.A. App. 265-67 (Slaight).) Other CJA lawyers actually thought an increase in CJA rates would be harmful to their economic self-interest because it would attract more and better lawyers to CJA practice. (C.A. App. 498.) Attracting additional lawyers to CJA practice was articulated by some of the leaders of the strike as being a major purpose of seeking CJA rates. (CX 38-I (Tr. 167); C.A. App. 235-37 (Koskoff), 160-61 (Perrotta).) Finally, as the ALJ found, the targets of the strike, the city officials, were "supportive of the boycotters' demands" and viewed the strike as "the only feasible way of getting a rate increase," which was "supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 226a, 228a-29a.) Such facts might well compel a finding that—regardless of whether the strikers had market power and therefore *could* coerce the government—there was neither anticompetitive effect, nor purpose, nor *actual* coercion here. They surely invalidate any presumption to the contrary.

Thus, the underlying rationale of the *per se* rule itself militates against its application in this case.

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strike, and several went out of their way to congratulate the lawyers on the success of the strike after it was over. (JX 13 at 81-82 (Tr. 66) (Koskoff); C.A. App. 187 (Perrotta).)

2. *Where Market Power is Lacking, a Boycott Whose Sole Purpose is to Petition the Legislature and to Generate Public Support for Legislation Falls Squarely Within the Policy of the* Noerr *Doctrine*

If examination of the *per se* rule itself were not sufficient to caution against its indiscriminate use in the context of a petitioning boycott, consideration of the policies underlying *Noerr* surely would be. *Noerr* teaches that the right to petition the government is a fundamental one, and that an intent to invade it is not to be lightly imputed to Congress. 365 U.S. at 138. As demonstrated above (pp. 23-27), the CJA lawyers' strike constituted political petitioning and served the traditional functions of such petitioning. The only conceivable policy reason for holding *Noerr* inapplicable to a petitioning boycott is that such a boycott could be coercive. But even assuming *arguendo* that the policy of *Noerr* does not extend to economic coercion of governmental action, Respondents simply could not have achieved their political ends through the exercise of economic coercion if they lacked market power. They would have had no ability to do so. The effects of their conduct, then, could only have resulted from the public attention and debate generated by the strike. Hence, any success Respondents achieved would be purely a political success—and that kind of persuasion in the context of the legislative process is at the core of what *Noerr* protects.

The FTC argues that to require proof of market power in a case such as this one is "fundamentally inconsistent with the delicate balance" articulated by this Court in cases such as *Noerr* and *Claiborne Hardware*. (FTC Br. 26.) The FTC fails to explain, however, how the court below strikes that balance less "delicately" than does a *per se* rule—which would condemn alike a strike by all 14,000 active members of the D.C. Bar in private practice, by the approximately 100 lawyers involved in this

case, or by any two of the four individual Respondents, acting in concert only with each other to make a symbolic point. Surely the FTC's rigid view of the boundaries of *Noerr* is not what this Court had in mind when it declared in *Allied Tube* that the entire "context and nature" of the challenged activity must be taken into account.[27]

3. *Withholding Application of the* Per Se *Rule in the Case of Political Boycotts Would Not Require Departure From Basic Antitrust Principles*

In its petition for certiorari, the FTC acknowledged the flexibility that has been required in giving content and boundaries to the *per se* rule, but argued that such flexibility is totally inapplicable here:

> To be sure, this Court has sometimes reinterpreted the Sherman Act to alter the categories of restraints subject to *per se* condemnation. *E.g.*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints). But these changes

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[27] 108 S. Ct. at 1939-42 & nn.10, 11. The FTC's only apparent answer to this is that it will exercise its prosecutorial discretion, which "a reviewing court may [not] second-guess." (FTC Br. 37.) But with respect to the antitrust laws (unlike the speed limits cited by the FTC), the primary protection against harmful misapplication has been construction by the courts, not the talisman of prosecutorial discretion—in part, perhaps, because the antitrust laws are also enforced by private parties.

Moreover, the suggestion that the protection of important constitutional rights should be entrusted to prosecutorial discretion runs counter to the principle that where potential deprivations of such rights are at issue,

> it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use . . . . Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Greene v. McElroy, 360 U.S. 474, 507 (1959) (citation omitted).

> have always flowed from changes in economic learning about the effect of certain categories of restraints upon competition.

(Petition at 13 n.10.) The FTC's position, in other words, is that the *per se* rule is sufficiently supple to accommodate the shifting tides of economic learning, but not the most fundamental values of the freedoms of expression and petition.[28]

This odd proposition apparently rests on the FTC's misperception that withholding application of the *per se* rule in a case such as this one requires a court to balance the interest in competition against some unrelated social good, contrary to the principle enunciated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 694-96 (1978).[29] Such is not the case. The issue here is not whether a presumed exercise of market power can be justified by some other social good, but whether the presumption itself has any validity in the political context in which the conduct took place. (*See supra* pp. 32-36.) As Judge Silberman noted in the concurrence below,

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[28] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (Citations omitted).

[29] FTC Br. 38. The right to petition might, in fact, be the rare case in which such balancing would be required, for far from having "no redeeming virtue," political activity—even of a heavy-handed variety—was deemed in *Noerr* to be so fundamental to our system of government that Congress could not have intended, in a law aimed at trade restraints, to restrict it. *Noerr*, 365 U.S. at 140-41. *Cf. Claiborne Hardware*, 458 U.S. at 914 n.48, quoting with approval a lower court statement that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott." For the reasons stated in text, however, this Court need not reach that possibility here.

> Since a boycott has the potential either to persuade or coerce . . . the only proxy we have for whether SCTLA relied on political or commercial power . . . is the degree of market power they enjoy. If they have none, the boycott must have succeeded out of persuasion and been a political activity.

(Pet. App. 60a.)

4. *Application of a Market Power Test Will Not Lead to the Dire Consequences Predicted by the FTC*

The FTC paints the consequences of the Court of Appeals' holding in apocalyptic terms, both within antitrust and beyond. (FTC Br. 33-40.) Its predictions are overdrawn.

In the first place, although the FTC finds it ironic that the federal antitrust laws might not be available to help in suppressing the next petitioning boycott (FTC Br. 34 n.29), it nowhere explains why it is *those* laws that must be invoked. Should this Court hold that a market power test governs on statutory grounds, any government—federal, state, or local—that feels its political processes to be threatened unduly by the spectre of boycotts by the economically powerless will remain free to test the accommodation between First Amendment values and its interest in protecting the purity of its political processes by drawing its own line in a different place.[30]

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[30] This also disposes of the FTC's suggestion that laws prohibiting public employee strikes could not survive the Court of Appeals' holding. (FTC Br. 38-39.) Both the interpretation of Congressional intent and the degree to which the means employed are adequately tailored to the governmental interest to be served vary with the specific statute in question. The FTC's citation (FTC Br. 27-28 n.21) of *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982) is inapposite for the same reason, particularly since antitrust liability on the same facts was *rejected*. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on separate issue*, 456 U.S. 212 (1982).

Moreover, the possibility that doctors, insurance companies, or others might also seek rule of reason treatment for similar conduct is an argument against a market power test only if it is *assumed* that in virtually all such cases the conduct would have a pernicious effect on competition and lack any redeeming virtue. In many cases, that assumption is untenable (as, for example, where the boycott is too limited in duration or participation to have any effect other than through publicity and persuasion). In other words, the FTC's example simply begs the question and amounts, at bottom, merely to a complaint about the government having to meet its burden of proof.

Finally, the FTC concedes that boycotts of the kind it fears "have thus far been infrequent." (FTC Br. 33.) But this is not because, as the FTC would have it, "most people have considered them illegal *per se*." (*Id.*) Many potential political boycotters probably have never heard of the *per se* rule against group boycotts, if indeed they are even familiar with the antitrust laws. Rather, the rarity of such boycotts reflects the fact that the target—the government—typically exercises a great deal of control over the fate of potential political boycotters, since such boycotters often depend on the government for their livelihood and are generally at its mercy. Consequently, most political boycotts are in fact carried out by picturesque "little people" in the Jeffersonian tradition—independent farmers, gasoline station operators, and the like—who have few alternative means of political expression (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and can hope for sympathetic coverage when they appear on the evening news pouring milk down the drain or otherwise dramatizing their plight. The extent to which such protests rely on sympathy to succeed is poignantly illustrated in the instant case, in which the court refrained from exercising its appointment power, the PDS refrained from contacting many of the law firms that might have offered help in keeping the court system operating, and the Mayor gave the protesters ad-

vice about how he would approach the matter "as an old organizer." (C.A. App. 110-11, 117-30, 193, 234, 310, 315-18, 330, 332-33, 342, 373, 422-28, 487-89, 521-22.)

Thus, regardless of how this Court rules, actions such as the lawyers' strike are likely to remain rare; the government, even without the antitrust laws, is far from powerless; and, as former D.C. Council Chairman Sterling Tucker put it, the government would "probably laugh in their faces" if these lawyers or some other group tried to repeat the strike without a strongly meritorious case. (C.A. App. 366-67.)[31]

B. Application of the *Per Se* Rule to Petitioning Boycotts Would Unnecessarily Restrict Political Expression and Would Therefore Violate the First Amendment

The court below held that application of a *per se* rule to Respondents' petitioning boycott would be more restrictive than essential to the government's interest in preserving competition, and hence barred by *United States v. O'Brien*, 391 U.S. 367 (1968). In this it was clearly correct. For all the reasons set forth above (pp. 38-40), application of the *per se* rule is not only unneces-

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[31] The infrequency of petitioning boycotts for reasons entirely independent of the antitrust laws also disposes of the fear of the court below that, in the case of parties *with* market power, applying the *Noerr* doctrine would be "the stuff of which economic chaos is made . . . from which the Sherman Act has shielded this country for almost a century." (Pet. App. 45a.) Indeed, there is no indication that in the century *before* the Sherman Act, "economic chaos" engulfed the Republic as a result of political boycotts by powerful groups. The FTC's suggestion that large corporations might be tempted to engage in expressive boycotts (FTC Br. 35 n.31) is belied by the fact that such corporations, which were not thought by the Sherman Act Congress to be shy about expressing their power in other respects, seem to have had no penchant for petitioning boycotts. Rather, the petitioning boycott has traditionally been the tool of the disenfranchised and the powerless. (*See* C.A. App. 272, 279, 286 (Salisbury).)

sary to the governmental interest in preserving competition, but is contrary to basic principles underlying the *per se* rule itself.

The FTC challenges this holding, arguing that the *per se* rule makes it easier to find defendants guilty of antitrust violations and that this ease serves administrative convenience and efficiency. It relies on *United States v. Albertini*, 472 U.S. 675 (1985), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), as establishing that administrative convenience is itself a substantial governmental interest that may justify abridgement of First Amendment freedoms. (FTC Br. 30, 31.)[32]

The FTC apparently reads *Albertini* and *Clark* as freeing the government from the need to distinguish the harmless from the harmful unless it can do so at no cost whatsoever. That cannot be the law, however. A complete ban on handbilling is, no doubt, the most efficient way of preventing that activity from contributing to litter, yet this Court has held that more tailored means were constitutionally required. *Schneider v. State*, 308 U.S. 147, 162-63 (1939); *see also Martin v. Struthers*, 319 U.S. 141, 147-48 (1943). To prevent unnecessary restrictions of expression, this Court has consistently required that the government pursue its ends through means "narrowly tailored to serve the government's legitimate content-neutral interests." *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989). Thus, even where only the lesser interests served by commercial speech are at stake, there must be

> a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents

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[32] The FTC also argues that the strike was not petitioning or communicative activity at all, and hence does not even trigger the *O'Brien* analysis. (FTC Br. 25-28.) This argument may be dismissed out of hand. As demonstrated above (pp. 23-27), the record is replete with evidence of the petitioning and communicative functions of the strike.

> not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' that employs . . . a means narrowly tailored to achieve the desired objective.

Board of Trustees v. Fox, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1988) (citations omitted). Moreover, "the State bears the burden of justifying its restrictions," and "must affirmatively establish the reasonable fit . . . require[d]." *Id.*

That "fit" cannot be established here. Congress' ends simply do not require the degree of overinclusiveness the FTC seeks. Even where no First Amendment interests are at stake, the *per se* rule is only appropriate where the likelihood that it would correctly identify anticompetitive conduct is so great that further examination is unjustified. *NCAA*, 468 U.S. at 103-04. Given that petitioning boycotts have been a traditional tool of the disenfranchised, rather than the economically powerful (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and given the reasons why, as an economic and political matter, such a boycott can succeed without at all implicating competitive concerns (*see supra* pp. 32-36), there is no reason to believe that a *per se* rule would be correct even in a majority of petitioning boycotts, let alone the overwhelming majority that would be required. In sum, the infringement of expression which application of the *per se* rule would impose is far out of proportion to the advancement of statutory objectives it would serve.

Of course, the government need not show that the rule it has applied is the least restrictive available in judicial hindsight. But there is no hindsight involved here. The rule of reason was no stranger to the FTC when it decided that an entire method of expression and petitioning should be subordinated to the ease of labeling conduct "price-fixing." To the contrary, the rule of reason is the "traditional framework of analysis" under Section 1 of the Sherman Act, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977), and the standard

under which most restraints are analyzed. *United States v. Topco Assocs.*, 405 U.S. 596, 607 (1972). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988).

Clark and *Albertini* also teach that a court should not arrogate to itself a regulatory role properly reserved to a legislature or delegated to an agency. *See Clark*, 468 U.S. at 299; *Albertini*, 472 U.S. at 689. But this principle has no application here. Unlike *Clark* and *Albertini*, which involved statutes or regulations whose plain language proscribed the challenged conduct, this case involves a statute that is cast in the broadest terms, has always required extensive judicial elaboration, and has purposes that are far removed from the conduct at issue. Determining the scope of the *per se* rule is quintessentially a judicial function, and it is hardly likely that the court below was insensitive to the administrative practicalities of proving an antitrust case.

This Court's recent decision in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989), is instructive. In testing whether a noise regulation burdened more speech than necessary to further the government's legitimate interests, the Court reiterated the principle that "[a] complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 4884, quoting *Frisby v. Schultz*, 108 S. Ct. 2495, 2503 (1988). The Court emphasized the limited restriction of expression at issue, noting that the

> guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate . . . and eliminates them *without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.*

57 U.S.L.W. at 4884 n.7 (emphasis added).[33]

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[33] *Rock Against Racism* also notes that if the regulatory scheme had a "substantial deleterious effect" on the speech involved, the

In contrast, the *per se* rule adopted by the FTC would ban *all* expressive boycotts by competitors, no matter how clearly symbolic, no matter how small a fraction of the available suppliers they may represent, no matter how brief in duration their boycott is, and no matter how much power the putative victim may have to end the boycott by legislative or judicial fiat. That such a total ban on politically motivated boycotting is unacceptably overbroad has already been established. In *Claiborne Hardware*, this Court acknowledged "the right of the States to regulate economic activity," yet held that it "could not justify a *complete prohibition* against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." 458 U.S. at 914 (emphasis added). No reason is apparent for the First Amendment to be more tolerant of a "complete prohibition" adopted for the administrative convenience of the FTC.

III. A "TRUNCATED" RULE OF REASON IS NOT APPROPRIATE FOR ASSESSING RESPONDENTS' CONDUCT

The FTC suggests that it might satisfy its burden of showing market power by the mere fact that the lawyers succeeded in getting the legislature to increase the price for the service they provided. (FTC Br. (I), 40-45.) It

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speakers' concerns "would have considerable force." 57 U.S.L.W. at 4885. In light of the statements made by Dean Branton and the Mayor to Respondents prior to the strike, the findings of the ALJ regarding the perceived total ineffectiveness of other means of petitioning, and the testimony of Prof. Salisbury regarding the relative effectiveness of various means of seeking media attention, the deleterious effect of a broad, untailored rule cannot be doubted. (*See* C.A. App. 402-05, 409-11 (Branton); Pet. App. 227a; C.A. App. 285-88 (Salisbury).)

seeks, in other words, to sustain its order on the basis of the only "rule of reason" analysis it has ever undertaken —a "truncated" analysis of the type used in *NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984). (Pet. App. 92a-98a.)

Applying a truncated analysis to these facts, however, ignores the very reason for using a rule of reason analysis in the first place. Unlike the case where a party advances plausible efficiencies to justify an otherwise naked restraint, the political aspects of the conduct here raise the issue of whether there was an adverse competitive effect in the first instance. To treat the legislative increase in price as a "demonstrated anticompetitive effect," obviating the need for a market power inquiry, is simply to beg the question.[34] As the court below noted:

> The normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena. . . . There are reasons to pause before inferring market power from detrimental effects when political power may be the more explanatory variable.

(Pet. App. 53a.)

Indeed, if there was any failing in the Court of Appeals' handling of the market power issue, it was in failing to hold as a matter of law that the record dem-

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[34] Such question-begging appears to have infected the FTC's handling of the market power issue at all levels. The ALJ's opinion, in language omitted from the quotation at FTC Br. 41-42 n.37, stated: "The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded." (Pet. App. 205a.) The FTC's opinion contains an unexplained statement in a single footnote (cited twice in the FTC's brief at 41-42 nn.37, 38) that "we agree with the finding of the Administrative Law Judge that the respondents had market power." The FTC's citation of *NCAA*, and the context of its opinion as a whole, suggest that it, too, was relying on the legislative increase in the statutory maximum CJA rate for its cryptic statement on market power.

onstrated a lack of market power on the part of the striking lawyers. The CJA lawyers clearly lacked both long-term [35] and short-term [36] market power. In par-

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[35] In the long term, it is undisputed that the increase in maximum CJA rates resulted in a dramatic increase in the number of lawyers volunteering to take CJA cases compared to those taking cases before the strike. Undisputed testimony as well as the records of the office responsible for administering the CJA program showed that the number of lawyers calling in to volunteer for CJA cases each day rose substantially the day after the new law was enacted (as compared with the period before the strike) and more than doubled within three weeks. (C.A. App. 140, 143, 161, 201-02.) The Court of Appeals acknowledged this, but noted that the rate increase that drew forth this new entry was substantially larger than that ordinarily used by the Justice Department in defining markets under the merger guidelines. (Pet. App. 52a.) The fact is, however, that those lawyers who had not previously volunteered for CJA cases on a regular basis could and would do so at a higher price. Thus, the only justification for treating legal services rendered by CJA lawyers as a distinct market is that none of the other 14,000 members of the bar were willing to work for such low wages. This is akin to the suggestion rejected in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 621-22 (1977) ("Fortner II"), that market power could be shown by "a willingness to provide cheap financing in order to sell expensive houses."

[36] In the short term, there were approximately 100-200 CJA lawyers who regularly took cases under the D.C. CJA. (Tr. 323, 326, 378-80, 383 (Robinson); JX 13 at 47-58 (Tr. 66) (Koskoff).) At the time of the hearing, approximately 14,000 active members of the D.C. Bar were engaged in private practice. (C.A. App. 121 (Carter), 375 (Isbell).) Over 1,500 members belonged to the section of the bar dealing with civil litigation. (C.A. App. 375.) Approximately 500 private attorneys engaged in an active civil practice on a regular basis in Superior Court, and numerous others practiced there less frequently. (C.A. App. 337-39; 122 (Carter).) Almost 600 attorneys belonged to Division 5 of the D.C. Bar, the section dealing with criminal law and individual rights. (C.A. App. 375.) Because of turnover, many lawyers in the District had prior government criminal experience in the 180-185 lawyer U.S. Attorney's office, the 50-lawyer PDS, the Criminal Division of the Department of Justice, or the Corporation Counsel's office. (C.A.

ticular, the court below erred in its conclusion that the Superior Court's power to appoint any of the 14,000 active members of the D.C. Bar—including the strikers themselves—was not dispositive because, according to the Court of Appeals, "a group that engages in a supply-disrupting boycott against the government should not ordinarily be permitted to defend against an antitrust suit on the ground that the government failed to use its extraordinary powers to relieve the economic pressure they had brought against it." (Pet. App. 52a.) The power of the court to appoint, persuade, or request was unquestionably a part of the "context" of the strike that *Allied Tube* enjoins a court to consider in a case having elements of petitioning: it was known to the lawyers when they embarked on the strike, recognizing that the court could easily break it; it was known to Respondent Koskoff, who took a case at a judge's request but refused compensation; and it was known to the numerous lawyers not regularly involved in CJA practice who would, according to the uncontradicted testimony, have accepted CJA cases had they been asked. (C.A. App. 451-52, 229-30 (Koskoff), 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill),

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App. 121 (Carter); *see also* C.A. App. 334-37, 385-87; Tr. 1088 (Pickering).)

Many of these lawyers would have volunteered to take CJA cases during the strike if they had been asked—which they were not. (C.A. App. 317-18, 331-33, 341-42, 371-72.) Virtually all of them would have taken cases had they been ordered to do so by the court (C.A. App. 318, 332-33, 342, 373)—as, indeed, would the CJA lawyers themselves. (C.A. App. 452; *cf.* C.A. App. 229-30.) These lawyers, even those without prior criminal experience, could have rendered effective assistance of counsel, aided by PDS training materials. (C.A. App. 310-11, 319-21, 341, 386-87.) Indeed, such lawyers have done so in the past under similar circumstances. (C.A. App. 310-11, 340-41, 373, 375-76, 425-28; RX 55-Z4 (Tr. 608).) In 1974, the D.C. court withstood a strike by using its appointment power for over two months (as compared with the two weeks that the current strike lasted) before the issue was resolved. (C.A. App. 125-27, 422-29.)

342 (Lopata), 373 (Loftis).) This context should have been considered by the court below, and based on that context, the court should have remanded with instructions to dismiss.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it held that Respondents' conduct could not be condemned without a market power determination, and reversed insofar as it failed to require dismissal of the case.

Respectfully submitted,

DONALD I. BAKER
(Counsel of Record)
WILLARD K. TOM
DAVID T. SHELLEDY
MICHAEL L. DENGER
WILLIS B. SNELL
W. TODD MILLER
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for Respondent/Cross-Petitioner Superior Court Trial Lawyers Association

August 1, 1989

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a legislative petitioning boycott, directed at both furthering the Constitutional rights of indigent criminal defendants and the economic benefit of their "striking" lawyers, is beyond the scope of the antitrust laws.

2. Whether a legislative petitioning boycott, in which the primary motive of the boycotters is to engage in political expression, is beyond the scope of the antitrust laws, even if such conduct causes incidental commercial effects.

3. Whether, if a legislative petitioning boycott is subject to the antitrust laws, it can be found unlawful without proof of anticompetitive purpose or effect.

PARTIES TO THE PROCEEDINGS

Respondents (and Cross-Petitioners), all of whom were respondents in the proceedings before the Federal Trade Commission, include the Superior Court Trial Lawyers Association ("SCTLA"), and Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison and Joanne D. Slaight (the "Individual Respondents"). None are incorporated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1198

FEDERAL TRADE COMMISSION,
Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT,
Respondents.

No. 88-1393

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INDIVIDUAL RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Amendment to the Constitution and Section One of the Sherman Act, 15 U.S.C. § 1, are set forth in the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198 at App. 230a, and are hereby incorporated by reference.

STATEMENT OF FACTS

As detailed in the brief filed concurrently in this appeal by the Superior Court Trial Lawyers Association ("SCTLA"),[1] in September 1983, some 100 private attorneys staged a boycott to pass a law. Virtually all were solo practitioners providing voluntary assistance to indigent criminal defendants in the District of Columbia Superior Court under the D.C. City Council's Criminal Justice Act of 1974. D.C. Code Ann. § 11-2601 *et seq.* Many were members of the SCTLA. They were seeking to increase the rates of compensation, legislatively set in 1974, which it was widely conceded provided neither fair compensation to the attorneys, nor adequate representation to their clients. (Tr. 1082 (Pickering); C.A. App. 324; Tr. 1451 (Lefstein)). The boycott was staged as a two week strike during which the striking lawyers continued to represent previously assigned clients, but took no new ones. The strike drew substantial media attention

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[1] The broad background to this case is set forth in the Statement of Facts in the SCTLA brief ("SCTLA Br."). To reduce repetition it is hereby incorporated by reference, including all citation forms set forth at note 1. This supplemental statement contains additional facts reflecting the perspective of the four Individual Respondents, Ralph Perrotta, Karen Koskoff, Reginald G. Addison and Joanne Slaight.

and coverage, previously unavailable. The coverage elicited sympathetic public support. Broader public support gave Court officials, the Mayor and the City Council an incentive and opportunity to declare an "emergency," enabling them to make their private support public, and to pass the law.

The strike's only purpose, not in dispute, was to influence the passage of legislation to appropriate more substantial funding to raise the inadequate level of compensation received by the volunteers ("CJA lawyers"), and thereby to improve the quality of legal services provided in the D.C. criminal justice system. Criminal justice experts testified that inadequate funding for legal counsel to indigent criminal defendants, in the District and elsewhere, undermines fulfillment of the government's responsibility for providing effective counsel, a responsibility with which it is charged by the Sixth Amendment to the U.S. Constitution. (C.A. App. 770-71).

In the words of Geoffrey Hazard, Director of The American Law Institute:

> It is a Constitutional question with a capital "C." It is a constitutional question with a small "c." It goes to the question of the social order, the decency with which the least attractive part of our citizenry is treated by authority. It has long been said that a society is known by the quality of its criminal justice. I believe that is true. . . . And the quality, therefore, of criminal justice, the quality of our civilization, is determined in part by the seriousness and substantiality of our provision for representation of indigents. (C.A. App. 326-27).

The strike succeeded. The Council passed legislation increasing the fee paid to CJA lawyers and thereby improved the quality of legal counsel provided to indigent defendants in the Superior Court. It is undisputed that, after the strike, twice as many lawyers volunteered to take

cases. (C.A. App. 140, 143, 161, 201-02). After the City Council had approved the law that was the object of the protest, and after the Mayor had invited three of the Individual Respondents to the signing ceremony and reception that followed (C.A. App. 193-94, 240, 961), the Federal Trade Commission brought this action, alleging that legislative petitioning by strike was *per se* price fixing.

The Individual Respondents were the strike's leaders. Mr. Perrotta was, at the time, President of the SCTLA; Ms. Koskoff was Vice-President; Mr. Addison was Secretary; and Ms. Slaight was Chairperson of the SCTLA's Strike Committee. (Pet. App. 6a, 8a).

All four were relative newcomers to CJA practice, but they had strong commitments to public interest work. Mr. Perrotta, a 1960 graduate of Harvard Law School, entered CJA practice only in 1979 after a varied career drafting Medicaid and child abuse legislation; establishing antipoverty, Head Start, legal services, and neighborhood health programs; and dealing with urban issues. (Pet. App. 148a-149a). Ms. Koskoff graduated from Antioch Law School in 1979 and began accepting CJA cases in 1981; she was active in high school and college in counselling drug addicts. She had been employed as a social worker and in a prison work release program and had been a staff attorney at the Public Defender Service in Pittsburgh. (Pet. App. 149a; Tr. 790 (Koskoff)). Mr. Addison graduated from George Washington University Law School in 1981 and began accepting CJA cases in 1982. He grew up in Southeast Washington and went into CJA practice determined to help those from a similar background. (Pet. App. 150a). Ms. Slaight graduated from Catholic University Law School in 1980 and began taking CJA cases in 1981. Before entering law school, she had been employed by the New York Public Interest Research Group and the California Department of Consumer Affairs. (Pet. App. 150a-151a; Tr. 950 (Slaight)).

There were several reasons why these four individuals assumed an active leadership role. They thought it was "the single most important thing" they could do to improve the quality of representation provided to indigent defendants. (C.A. App. 156-61; see also C.A. App. 235-40, 263-67, 450, 474-77, 480-81, 497-98, 504-05). They also did so because they were young and idealistic and "just didn't know any better." (C.A. App. 258-59).

> I had not been in the system so long that I would think that it wouldn't work, . . . I was idealistic and I just went on into this thinking that I came here . . . to do a good job for [my clients]. (C.A. App. 259).

The Individual Respondents believed that the best way "to upgrade the practice . . . for indigents was to raise the rates" because higher rates "would bring in more lawyers" and eliminate a "sense that any lawyer who walked in off the street, if he was a member of the bar, was not only qualified to take cases but was entitled to have cases." (Tr. 673-75 (Perrotta)).

While the CJA lawyers were not disenfranchised, as were many of their clients, they received little respect as assigned poverty defense lawyers within the criminal justice system. According to Mr. Perrotta:

> There was also a sense that the lawyers were treated by everyone in the system as though they were almost interchangeably in terms of the way they were treated with their clients. That is kind of, that is an interesting phenomenon.
>
> To some extent that is desirable because it means you are identifying with your client and you relate to him and you convey that sense that you identify with him, so it is understandable in those circumstances that you may be treated like him. Of course, it is not nice that even clients are treated that way and they ought not to be but the fact is from the marshals up to the judges, there was a sense that we

> were there almost to be punished or at least we were always, there was an expectation that there always ought to be, it was useful to us to always be anxious about the possibility of being punished along with our clients.
>
> * * * *
>
> And there was, I have heard, one judge express, I thought sarcastically, but he was expressing his true feelings, the desire, the wish that he could sentence the lawyer as well as his client, he was so furious at him.
>
> There was that sense and I think that sense is contributed to by the fact that there was a feeling, an atmosphere that we were dependent on the courthouse and cases were being tossed at us like crumbs and we were all scrambling for them to get as many as we could to try to make some kind of decent living.

(C.A. App. 158-60). They were working for an improvement in the system and to them this necessarily meant improving their own circumstances.

Ms. Koskoff testified that "[t]he main purpose of supporting the bill was adequate representation of counsel. . . . We are hoping that when the $35 goes into effect, that it would generate more of an interest from attorneys who had been previously disinclined to come down, and hopefully that will generate some kind of life into the system. And the quality of representation should, I think, become better because of that." (C.A. App. 236). Ms. Koskoff described a two step process:

> The first step [recognizes that] one had to take under the old system an enormous number of cases. . . . So the idea of the bill . . . was that if you or if I, Karen Koskoff, only had to take half of them or two-thirds, that meant the case, because of the hourly rate, so you could work on more per case. . . . But there is a converse to that, that is, that the only way that that can work is if more lawyers are coming down.

> The other part of that is, aside directly from the money, is that. . . [o]ur idea was that if new lawyers were coming into the system it breathes life into a system, makes things move, and that as those new lawyers go through the system and judges get to see them in trial [and through the appointment process] eventually it will have the effect of better appointments, particularly in very serious cases. That is obviously essential. It is essential in any case. That is what all this means. (C.A. App. 236-39).

The Individual Respondents' concern with improving the quality of CJA representation did not end at the close of the strike. As Respondent Koskoff testified, regular meetings with Judge Moultrie continued to discuss "establishing certain competency standards for representation of indigents now, that they have enough people that they can choose from to represent them." (Tr. 838 (Koskoff)).

Nor were the Individual Respondents interested in increasing their yearly income; an increase in the ceiling on annual fees was not sought:

> There were yearly ceilings, and that they had not changed then. So that the assumption was, well, I could still make up to the ceiling each year. So that wouldn't change. It would just be the focus of the work. You would be able to work on less cases and spend more time on each individual case. (C.A. App. 237).

Ms. Slaight joined the strike because

> I didn't feel that I could adequately represent my clients at those rates. . . . Because it was the right thing to do, ... [B]ecause I didn't feel that clients could get quality representation at the rates that were presently in effect, which was $20 an hour and $30 an hour, because the attorneys could not afford to give them the kind of representation that they deserved. . . . I felt that I was doing more for my clients by supporting the increase in legislation than

> I had done for the last two and a half years. (C.A. App. 263-67).

She had already decided to leave the CJA program and Washington law practice and had stopped assuming new cases even before the strike began (C.A. App. 265).

Mr. Addison felt that the low rates

> forced [CJA Lawyers] to take so many cases in order to make a living that we were not able to provide the quality of representation that we thought was Constitutionally mandated and that our clients deserved. . . . [T]he issue was a decreased case load, not a pay raise per se. The pay raise was the mechanism through which the decreased case load would be accomplished. . . . Better conditions for us means better representation for them. There is no way to help our clients without doing something for us. (Tr. 55-56, 118 (Addison)).

The FTC did not rebut this testimony.[2]

Notwithstanding substantial pre-strike efforts, the CJA lawyers were unable to secure legislation. The effort was trapped in two catch 22's. The first involved the Chief Judge of the Superior Court, Judge Moultrie. He expressed private support for the CJA lawyers, but refused to express public support because, he said, at a later point he might have to pass on the Constitutionality of any legislation (C.A. App. 164). The Mayor, through his Counsel, Herbert Reid, said he could not act if the Chief Judge of the Superior Court would not even publicly request him to. (C.A. App. 166-67, 217, 529). The second catch 22 was set by the Mayor and members of the City Council. The Mayor said he could not act until asked to by the City Council (C.A. App. 208-209). From the Council's vantage, however, as stated by one of its

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[2] Judge Needelman found that "the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of rate change." (Pet. App. 227a).

spokesmen, because the Council relies on the Mayor for analysis of the fiscal impact of the District of proposed legislation, he had to be the initiator. (C.A. App. 252). Without public encouragement to break those traps no one moved, even though no one in the D.C. government spoke out against legislation to raise the fees (Pet. App. 226a, 228a-229a; C.A. App. 717).

It was becoming increasingly clear that without some form of direct, dramatic action that would try to draw the attention of the media and, through the media, to seek the support of the public, there would be no legislation. (C.A. App. 285-86).[3] The previous, traditional legislative efforts to increase CJA fees were hardly even reported during the 7½ month period from January 1 to August 11, 1983. Only 1 story about the issue was published in the *Washington Post* during this period (on June 13, at p. B2).

On the advice of the late Wiley Branton, then Dean of Howard Law School, (C.A. App. 410-11), and with the "knowing wink" of Mayor Barry,[4] who, when advised of the intent to strike, told the Individual Respondents "you do what you have to do and I will do what I have to do," (C.A. App. 177, 223-24, 515a-b, 517), the CJA lawyers went on strike.

According to Mr. Perrotta, by their action the CJA Lawyers provided "the community at large, beyond the handful of leaders whom we had seen" the opportunity "to respond to our request and react to it." (C.A. App.

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[3] According to Sterling Tucker, former Chairman of the D.C. City Council, media coverage is "vitally important" to local politicians in this media-conscious city, and D.C. Government officials and Councilmembers pay considerable attention to the media. (C.A. App. 353-56).

[4] Judge Needelman described the government officials' collective response to the strike as "the buyer's knowing wink," as contrasted with that of a buyer "determined to deal at arms length with the seller." (Pet. App. 226a).

184). The strike was designed to prompt public debate in the popular media and, as a result, provide the necessary public figures with the impetus to take a public position on the CJA rates issue:

> There was an opportunity for Harold Greene, former Chief Judge of the Superior Court to express himself and there was an opportunity finally even for Judge Moultrie who was so sensitive about potential conflict that he faced [to follow suit.]
>
> * * * *
>
> Judge Moultrie [had] never asked for the money. Finally Judge Moultrie asked for the money in a sense and I think the Mayor is in a position at that point to say, well, now I know that the community is really behind this, everybody is behind it. No one came out against it.

(C.A. App. 185-86).

More importantly, the strike provided the D.C. government with a quick and accurate picture of public opinion on the issue. Lacking this prior to the strike, the Mayor and City Council simply would not act:

> [F]or all that the Mayor knew in advance, the reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city.
>
> The reaction might have been the crime rate is already so enormous. . . .
>
> There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense.
>
> And I think it was a process that everybody understood, that we had to go through and the reason I know and I feel deeply in my bones that that is what

> was happening is that we never got an unkind word from anybody after the strike.
>
> * * * *
>
> And after the strike, several judges went out of their way to volunteer to me how pleased they were at our success. That was true about Judge Moultrie as well as judges generally.

(C.A. App. 186-87).

The strike received broad and sympathetic media attention, from, among others, *The Economist* of London and the CBS Network Morning News. (C.A. App. 900, 921-22, 930, 954). During the 6 week period after the strike was announced, on August 11, 1983, the *Washington Post* and *Washington Times* published a total of at least 25 stories about the CJA legislative effort.[5]

The resulting public support broke both the catch 22 between Judge Moultrie and the Mayor (the Judge was finally able to declare to the Mayor his support for the fee increase), (C.A. App. 396-97, 948, 955), and the

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[5] *Washington Post*

August 12	p. B1	September 9	p. B1
August 22	p. B2	September 10	p. B3
August 27	p. B8	September 12	p. D2
August 29	p. B2	September 12	(a second article)
August 30	p. C1	September 13	p. C4
September 5	p. B2	September 15	p. B1
September 7	p. A1	September 16	p. B1
September 8	p. C9	September 16	p. B1 (a second article)
September 8 (a second article)		September 17	p. B1
		September 19	p. D1

Washington Times

August 11 (C.A. App. 897)
August 12 (*id.* at 898)
September 6 (*id.* at 927)
September 6 (a second article) (*id.* at 928)
September 7 (*id.* at 932)
September 16 (*id.* at 952)

catch 22 between the Mayor and the Council (the Mayor was finally able to write a letter to the City Council requesting passage of emergency legislation). (Pet. App. 200a-202a). During the strike, no indigent accused was denied legal representation (Tr. 103 (Francis D. Carter)).

In the initial decision at trial, Judge Needelman held that the CJA strike did not violate the antitrust laws because it caused "no harm." (Pet. App. 227a). He found that the strike was viewed by City officials responsible for passing the legislation "as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 228a-229a). Judge Needelman refused to decide the case on the basis of whether the strike was "politically motivated action" or "coercion directed at the 'competitive process,'" recognizing that the FTC's "bright line separation . . . assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent." (Pet. App. 226a).

The decision of the FTC reversed Judge Needelman's initial decision, holding that CJA lawyers "coerced" the D.C. government into raising fees in *per se* violation of Section 5 of the FTC Act (Pet. App. 71a, 87a, 92a, 138a). The FTC rejected any notion that the asserted political dimensions of a case involving the provision of effective counsel mandated by the Sixth Amendment "alter the nature [of] paradigmatic examples of restraints of trade." (Pet. App. 92a). The FTC also found the strike illegal under a rule of reason analysis, rejecting, *inter alia*, Judge Needelman's finding that the City was "supportive of the boycotters demands and that the strike was 'accompanied by the buyer's knowing wink'." (Pet. App. 96a).

The Court of Appeals rejected both decisions. It concluded that the strike was primarily motivated by economic concerns, and was therefore "commercial activity

with a political impact." (Pet. App. 44a). As such, the conduct was not totally beyond the reach of the antitrust laws. The Court further concluded, however, that the SCTLA boycott contained elements of expression justifying First Amendment protection. Because of the presence of important First Amendment rights, the Court rejected the FTC's *per se* condemnation of the CJA lawyers' conduct. The Court vacated the order of the Commission and remanded the case for a determination of whether the striking lawyers possessed market power. The purpose of the market power inquiry is to determine whether the D.C. City Council approved the CJA rate increase in response to the exercise of market power, or in response to changes in public attitudes from the publicity generated by the strike.

Judge Silberman, in a concurring opinion, expressed concern with the majority's analysis of the CJA lawyers' "subjective motivation" as a basis for determining whether they were engaging in political speech, because "[t]he setting of reimbursement levels for publicly appointed defense counsel is a political issue [and] petitioners' self-interest does not strip their speech of its political character." (Pet. App. 59a). Instead, he said, the distinction between commercial activity with political impact and political activity with commercial impact should focus on the *means* employed in eliciting a governmental response (*i.e.*, political persuasion or economic power). Nevertheless, he agreed that a market power test was proper to determine whether the strike succeeded due to persuasion or coercion.[6]

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[6] The Court of Appeals did not rule on the CJA lawyers' contention that the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. If this Court reverses the Court of Appeals and finds the Individual Respondents in violation of the FTC Act, it should remand to the Court of Appeals for a determination on this issue.

The FTC's petition for reconsideration was denied on October 25, 1988. On January 23, 1989 the FTC petitioned this Court for certiorari and on February 22, 1989 respondents cross-petitioned for certiorari. On April 17, 1989, certiorari was granted on both petitions.

SUMMARY OF ARGUMENT

This case involves the government restricting the participation of the Individual Respondents in a boycott (they called a strike) to petition for legislative change. The boycott was aimed directly at promoting the passage of legislation by the District of Columbia City Council. The Individual Respondents led the boycott. Among their motives was a concern with the extent to which their clients were receiving effective assistance of legal counsel as required by the Sixth Amendment to the Constitution. The boycott sought passage of legislation that was intended to, and did, have the effect of increasing the supply of competent attorneys providing legal services under the CJA System and of improving their conditions of employment. This is the first appeal heard by this Court to address the application of the antitrust laws to a legislative petitioning boycott and, if the antitrust laws do apply, to consider whether the appropriate antitrust analysis includes scrutiny of the purpose and effect of the conduct under a rule of reason.

There are two rules, each supported by sound authority and the facts of this case, which lead to the conclusion that the legislative boycott here in issue is not subject to the jurisdiction of the Sherman Act (the applicable antitrust law). The first rule is that a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act. The Sherman Act should, as a matter of political history, democratic theory and legislative construction, be construed to exclude such conduct. The second rule is that even if legislative petitioning boycotts are not always beyond the Sherman Act, when the primary motive of the boycotters is to engage in political expression, the incidental commercial

effects of such conduct are outside the Sherman Act, especially where the legislation sought is believed necessary to vindicate the Constitutional rights of a disadvantaged group.

Legislative boycotts are a form of political expression that have played an important role in the history of this nation, especially to provide a means of political access to those in our society who are either economically disadvantaged and/or disenfranchised, and who thereby lack "normal," (C.A. App. 92), means of access. If such political boycotts are subject to the antitrust laws, access to the political process, particularly by the disadvantaged, will be substantially foreclosed. Such a radical step should not be for the courts to take. It should be for the legislature to determine in the first instance when it needs help in protecting itself from petitioning conduct.

To apply the Sherman Act under a rule of reason standard in which market power becomes the surrogate for determining whether a legislative boycott is primarily commercial or political, would seriously damage the process of legislative petitioning and impose an imprecise, prospective standard significantly chilling such petitioning. If, however, the Sherman Act is held to apply to legislative petitioning boycotts, to avoid these mischiefs, a rule of reason must be applied. The strike in this case should be found reasonable because its primary purpose was pro-competitive and it had no significant anticompetitive effect.

ARGUMENT

I. THE CJA LAWYERS' STRIKE WAS LEGISLATIVE PETITIONING, BEYOND THE SCOPE OF THE SHERMAN ACT.

This is the first case, so far as we can determine, in which a federal or state court has sought to apply the Sherman Act to legislative petitioning by boycott,[7] conduct which plays an important and constructive role in the American political process. In so doing, the FTC and the Court below not only made new law, but did so in a way that assumes responsibilities properly belonging to legislatures. Under either of two formulations of the appropriate legal standard, the strike is not subject to the antitrust laws.

The Court of Appeals found that the "immediate purpose" of the strikers was "increasing the price they were paid for their services," and that their motive in improving the quality of legal services available to indigent defendants was "distinctly secondary." (Pet. App. 42a). The Court of Appeals thereupon concluded that a primarily self-interested boycott cannot be political conduct outside the Sherman Act. (Pet. App. 44a-45a). A determination that a boycott is substantially self-interested thereby becomes a surrogate for finding that it is commercial, not political. Behind this reasoning, it appears, is a fear that:

> immunizing all non-violent boycotts aimed at affecting the legislative process [would be] the stuff of

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[7] There have been several lower court decisions addressing the applicability of the antitrust laws to governmental boycotts. Virtually all such cases, however, involved the lobbying of non-legislative government officials. Two cases relating to boycotts of legislatures other than the decision below have found them not to be within the ambit of restraint of trade laws. *See NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982) (Mississippi restraint of trade statute). *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1300 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*NOW*") (Sherman Act). *See also* n.11, *infra*.

> which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century. (Pet. App. 45a).

The Court of Appeals ignores that the strike had to have been legislative petitioning first and foremost, because only the legislature had the power to change the CJA rates. It also ignores the fact that the antitrust laws have played little if any role heretofore in restraining "coercive political action" by industry or others, and therefore deserves no credit for the fact that such "chaotic" action has not been a "problem" in American history. The Court's concern begs the critical question: it assumes the Sherman Act has always applied to legislative petioning by boycott if economic pressure is applied, and if the boycott is self-interested, and that courts have never "immunized," (Pet. App. 45a), such conduct. The assumption is false. Conduct not reached by a law requires no immunity from it.

Having wrongly assumed that the Sherman Act must, absent a specific exemption or immunity, reach self-interested legislative petitioning by boycott, both the Court below and the FTC then looked to see whether the *Noerr-Pennington* doctrine goes so far as to immunize self-interested petitioning boycotts based on the imperatives of the First Amendment.[8] Since the *Noerr* Court was not faced with such a boycott, they conclude that a narrow reading of *Noerr* does not insulate the strike. (Pet. App. 32a-45a; FTC Br. 4-7). But the proper question is not whether *Noerr* immunizes or shields the strike.

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[8] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-40 (1961) ("*Noerr*"); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("*Pennington*") ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose."). Although courts frequently refer to *Noerr-Pennington* immunity (*e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1938 (1988) ("*Allied Tube*"), the doctrine is correctly one of statutory construction. *See Noerr*, 365 U.S. at 132 n.6.

The question is whether the Sherman Act applies to this boycott at all, for if the Act does not apply, then the conduct need not be immunized.

The *Noerr* Court recognized that the Sherman Act should not be construed to conflict with Constitutional principles. *See Noerr*, 365 U.S. at 138 ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); *id.* at 141 ("Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.").[9]

Contrary to the assumption of the Court of Appeals (Pet. App. 16a), Section 1 of the Sherman Act[10] was never intended to proscribe direct legislative petitioning in the form of a boycott, whether or not the boycotters would benefit significantly if the petitioning were successful.[11] The Court below, finding that the strikers were

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[9] *E.g., Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), *cited in* 3A *Sutherland Stat. Const.* § 74.11 (1986).

[10] In this proceeding, the FTC states that the jurisprudence of Section 1 of the Sherman Act, 15 U.S.C. § 1, controls its decision (FTC Br. 5 n.7). This is accepted by the Court of Appeals. Accordingly, the relevant antitrust statute whose applicability in this case is to be considered is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914.

[11] The Court below refers to several lower court decisions that have applied the antitrust laws to efforts, including boycotts, to "coerce" the government. None of the cases cited by the Court below, however, (Pet. App. 34a n.23) involved legislative petitioning. *E.g. Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (alleged illegal influence of local zoning board whose decisions were subject to City Council review), *cert. denied*, 461 U.S. 945 (1983); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096 (9th

economically self-interested, characterized the CJA lawyers' strike as "commercial activity with a political impact" (Pet. App. 44a). But no label can change the undisputed record that the exclusive purpose of the boycott was to promote the passage of a law by a legislative body. The Court of Appeals explicitly accepted that this boycott was aimed at obtaining legislation from the District of Columbia government, (Pet. App. 2a), took place in the "legislative arena," (Pet. App. 37a), and involved political expression. (Pet. App. 46a, 47a). It is irrelevant whether the CJA lawyers pressured the legislature, whether the legislature was also a buyer, or whether the strikers were economically self-interested.[12]

Cir.) (threats and intimidation of State Fair officials), *cert. denied*, 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (false statements to Texas Railroad Commission), *cert. denied*, 404 U.S. 1047 (1972); *United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986) (agreement denying contractual price discounts for medical services to Indian Health Services, an agency of the Department of Health and Human Services); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567 (M.D. Tenn. 1984) (private agreement by architects not to compete for public contracts for the Metropolitan Nashville Airport Terminal and the Nashville Convention Center).

[12] It is conceded that the CJA lawyers wanted a living hourly fee for work performed and that many of them believed they stood to benefit directly if legislation to that effect was adopted. But the record amply supports a finding that as to the Individual Respondents, and many of the others, the motive was, more significantly, to bring more and better lawyers into the CJA system to improve the environment in the Superior Court where the lawyers worked, and generally to enable CJA lawyers to provide more effective representation. (*Supra* pp. 6-8). It also supports a finding that improving the fees was, as Professor Hazard testified, directly related to securing the Constitutional right to effective counsel. (*Supra* p. 3). Furthermore, no increase was sought in the maximum annual level of fees the CJA lawyers could receive for taking cases. (Tr. 834 (Koskoff)). The record is less clear than the Court below would see it that the joint action had an anticompetitive purpose. (See *infra* p. 40) Since the FTC and the Court below construe the Sherman Act in a way which adversely

A. American Political History And The Legislative History Of The Sherman Act Show No Purpose To Outlaw Legislative Petitioning By Boycott.

That the Sherman Act is "important to the preservation of economic freedom," as the FTC reminds us (FTC Br. 28-29), and that boycotts *outside the legislative arena* are usually, but not always,[13] proscribed by that law, do not justify the FTC's or the Court's assumption that the Act applies to boycotts which constitute self-interested *legislative* petitioning. The precise scope of the Act's prohibtions is unclear from its face and therefore "courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("*Apex Hosiery*").

The Act "was intended to apply existing common law principles to the trusts and other business organizations of the day." [14] Virtually all forms of anticompetitive

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implicates the Individual Respondents' First Amendment rights, this Court is free to undertake a *de novo* review of the factual record. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.50 (1982) ("*Claiborne*"); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

[13] *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985).

[14] 1 E. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 30 (1978). *See, e.g.*, 21 Cong. Rec. 2460 (1890) (remarks of Senator Sherman); *id.* at 3146 (remarks of Senator Hoar). There were four identifiable categories of restrictive trade practices in the common law in 1889, each addressing a different competitive evil. There was the law concerning chartered monopolies, setting limits on state-created monopolies; there was the law against the evasion of market regulations, such as forestalling (selling out of hours), regrating (acting as a middleman, buying and selling in the same market), and engrossing, or cornering the market; there was the law against restrictive contracts; and there was the law against unreasonable combinations in restraint of trade. The fourth category is the one at issue here. Over the preceding 500 years there had been many cases at common law dealing with restrictive combinations. Some dealt with con-

conduct that have been held to be violations of the Act can be found as the subject of litigation in pre-Act common law.[15] We have, however, been unable to find a single case before 1890 in which political boycotts of any kind, let alone such boycotts constituting legislative petitioning, provided the basis for antitrust liability, or even for antitrust challenge.[16] Reading the language of the Sherman Act, one is to be "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). For this reason alone, protection of legislatures from lobbying combinations should not be considered a concern of the Sherman Act Congress.

The lack of specific reference to legislative boycotts in the Sherman Act is not because Senator Sherman and his colleagues were unaware of the economic pressures on legislatures that could be applied in the context of political boycotts. The late 19th Century was a period of rough and tumble aggressive legislative politics and legislators were constantly subjected to intense econom-

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certed refusals to deal, and a few involved collective efforts by workers to raise the price of their labor to private employers. *See generally* Peppin, *Price-Fixing Agreements Under the Sherman Antitrust Law*, 28 Calif. L. Rev. 297 (1940). *See also* Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va. L. Rev. 759 (1955).

[15] *See Apex Hosiery*, 310 U.S. at 498 ("This Court has . . . repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law . . . .").

[16] We have reviewed the common law cases cited by Senator Sherman, the cases cited by then Judge Taft in his famous review of the common law in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), Justice Stone's exhaustive opinion in *Apex Hosiery*, 310 U.S. at 469, as well as several scholarly law review articles on the history of the Sherman Act.

ically-motivated pressures.[17] The legislators of that period were no doubt familiar with the important part such boycotts played in the founding of our nation and thereafter. Boycotts analogous to the CJA lawyers strike, boycotts aimed at influencing legislation in the English Parliament (the legislative sovereign of the colonies), received the support and participation of our founding leaders.[18] In many instances, direct economic benefits

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[17] The years leading up to the Sherman Act saw the birth and growth of "lobbying" by big business. Railroads, in particular, resorted to such measures as bribery, providing free passes for transportation, and selling stock to Congressmen at attractive prices. *See* D. Rothman, *Politics and Power, The United States Senate 1869-1901* 199-201 (1966). As Rothman notes, however, "Senators, corporations discovered, were not loyal allies . . . . [W]hatever corruption existed did not settle the fate of legislative questions." *Id.* at 201. By the 1890's, public attitudes about conflicts of interest led to more circumspect behavior by Senators and lobbyists. At the same time, state legislatures had begun to regulate lobbying directly. *See* G. Galloway, *The Legislative Process in Congress* 499 (1953) (reviewing enactment of lobbying laws by Georgia (1877), Massachusetts (1890), Wisconsin (1899), and New York (1905)).

[18] For example, George Washington helped draft an agreement signed by the Virginia House of Burgesses in 1769 protesting English adoption of the Townshend Acts, imposing high duties on imports. J. Flexner, *George Washington: The Forge of Experience (1732-1775)* 312, 327 (1965). In 1774, the First Continental Congress approved the Continental Association, a consumer (import) and supplier (export) boycott agreement to pressure Parliament into relieving the colonies from excessive taxation. A. Schlesinger, *The Colonial Merchants and the American Revolution* 393-473 (1939). Thomas Jefferson drafted the model on which the Continental Association's agreement was based, and Franklin, Madison, John Adams and John Jay were active supporters. D. Malone, *Jefferson and His Time: Jefferson: The Virginian* 137-38, 192 (1948), A. Schlesinger, *supra*, at 220, 415, 416. R. Ketcham, *James Madison: A Biography* 61, 63 (1971). Nor were these revolutionary agreements. The signers affirmed that they petitioned as "his majesty's most loyal subjects" and that their purpose was to achieve the repeal of "several acts of parliament passed since the close of the last war." I *Journals of the Continental Congress 1774-1789* (W.C. Ford ed. 1904).

were derived by such boycotters as George Washington, Thomas Jefferson, and James Madison.[19]

Boycotts promoting legislation have also been a part of the legitimate political heritage of our nation since its foundation. Before the Civil War, abolitionists organized a boycott of goods produced by slaves. H. Laidler, *Boycotts and the Labor Struggle* 55 (1913) and, at approximately the time of Sherman Act passage, The National Consumers' League promoted "white-list" boycotts of "sweat-shop" department stores. *Id.* at 33-35. At the same time, prohibitionists were boycotting liquor dealers. *Id.* at 55. These boycotts were not, apparently, subjected to common law challenge.

With this historical background, and with the absence of concern with economically self-interested political boycotts in the pre-Act common law, there is no basis for the FTC or the Court below to have assumed that the Act was intended to treat legislative boycotts as a commercial evil. On the contrary, portions of the Sherman Act debates provide support for the proposition, endorsed by this Court in *Apex Hosiery*, that the Sherman Act was intended to reach commercial restraints in commercial markets, *Apex Hosiery*, 310 U.S. at 502-03, not boycotts aimed at moral-public policy issues, 21 Cong. Rec. at 2658-59 (Mar. 26, 1890) (remarks of Senators Wilson, Hoar and Sherman relating specifically to temperance boycotts of saloons),[20] or most disputes over employment.[21]

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[19] For example, many non-exportation agreements contained provisions divesting courts of their ability to hear cases involving foreclosure based on debts colonials owed to English creditors. George Washington, concerned about the debt attaching to his own estate, explicitly favored provisions against exportation to frustrate foreclosures. J. Flexner, *supra* n.18 at 312, 327. Non-exportation agreements also kept precious metals within the U.S. market, to the advantage of some dealing in them. C. Andrews, *Boston Merchants and the Non-Importation Movement* 199 (1919).

[20] *See also NOW*, 620 F.2d at 1302-09.

[21] The FTC points out that to the extent the CJA lawyers are employed by the District of Columbia when they participate in the

B. Political Boycotts Like The Strike Play An Indispensable Role In The Legislative Process In Our Democracy.

The FTC considered the strike a "disruption of the normal channels of government decision-making [that] is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it" (Pet. App. 122a). They reveal a misunderstanding of the legislative process. That process is fundamentally different from administrative and judicial functioning. The legislative process was designed to deal with the intense political pressure by various interest groups which the exercise of power invites and requires. The very nature of the legislative process encourages competing commercial interests to attempt to gain economic advantages through legislation. The legislative branch of government was perceived by the framers as being the forum in which interest groups, in the pursuit of their narrow, economic self-interest, would drive the engines of government:

> "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations . . . . The regulation of these various and interfering interests forms the principal task of modern legisla-

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CJA system, they are prevented by statute (5 U.S.C. § 7311(3)) from striking (FTC Br. 27). It should be noted that the relevant statute cited by the FTC is not the Sherman Act. The legislature is manifestly capable of passing legislation, where necessary, to deal with disruptive conduct, without the aid of Sherman Act enforcement. (*Infra* p. 36). Nothing better illustrates the FTC's misapprehension of the scope of the antitrust laws than its citation (FTC Br. 18 n.13) of *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), for its holding that the First Amendment does not protect an expressive boycott from application of a Congressional enactment specifically aimed at secondary labor boycotts. The FTC fails to mention that the application of the *antitrust* laws was *rejected* by the Court of Appeals, for reasons present here. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982).

> tion and involves the spirit of party and faction in the necessary and ordinary operations of government.[22]

Because the Constitution grants to Congress the power to tax and to appropriate funds, much of the legislative process revolves around self-interested factions pressuring Congress to promote various economic activities through tax and fiscal policies.[23] Those who participate in the process almost certainly have the most direct, economic self-interest in the outcome. Indeed, citizens driven by personal economic motive "provide much of the information upon which the government must act." *Noerr*, 365 U.S. at 139. Although "corruption" of the legislative process through, for instance, bribery, can be properly regulated through specific statutes, narrowly drawn to address the offending conduct (*e.g.*, 18 U.S.C. § 203), petitioning boycotts have not been so singled out.

Legislators are used to self-interested pressure and threats. The process is ofen described as "no-holds-barred." *Noerr*, 365 U.S. at 144. Those with money often threaten to withhold it, or give it to a rival, if dissatisfied with a legislator's position. Those who appear to control a group of voters often threaten the loss of voter support. Those with access to the media frequently threaten negative publicity. It is rare indeed where those whose only resource is their time and ability to work, may threaten to withhold that modest resource to promote public debate and legislative action. Individual CJA lawyers threatening to strike in isolation would not have been listened to any more than if they had only been

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[22] *The Federalist* No. 10, at 79 (J. Madison) (C. Rossiter ed. 1961). The legislative process, for example, tolerates misrepresentations to government officials. Courts or administrative agencies are not structured for such rough political tactics. *E.g. California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

[23] Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L. J. 618, 654.

permitted to employ the "normal" forms of political speech, less dramatic and pressuring than a strike, forms which had been ignored for the preceding 8 years. " 'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' " *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), (quoting, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *accord Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."). It is a misapprehension of the legislative process to view this strike or any similar petitioning boycott as any more threatening to legislators than the more powerful threats with which they routinely deal.

As regularly elected public officials, legislators must be alert to public opinion, skilled in recognizing what their constituents want and adept at shaping that opinion and deflecting unwelcome lobbying pressure. They find or invent conflicting interests and, by using techniques such as the catch 22's used by the politicians with the CJA lawyers, (*supra* pp. 8-9), deflect responsibility until public support is established. As former D.C. Council Chairman Sterling Tucker observed, if the CJA lawyers had tried to seek an excessive fee increase by threatening a second strike, the D.C. government would "probably laugh in their faces." (C.A. App. 366-67).

The Court of Appeals points out that "[m]ore than one-fifth of the gross national product is purchased by government entities with money derived from legislative appropriations." (Pet. App. 45a). It is true that government agencies often act as ordinary buyers in commerce for products and services. Virtually all government procurement is made by executive or administrative agencies under non-specific appropriations which give them the responsibility for determining the price to pay. Legislatures, too, have administrative personnel to buy light bulbs and contract for food service. Such procurement,

however, almost never raises legislative issues.[24] Conspiracies to cheat the government, through, for example, predatory conduct,[25] do not involve legislative petitioning. Unlike this case, such joint activity is not itself political, nor is it aimed at affecting the legislative process.

In the ordinary procurement situation, bureaucrats typically lack political power to resist a supplier trade restraint. Their function is largely commercial.[26] Here, the legislature was the governmental body that had the power to address the strikers' issues. Only the legislature has the power and responsibility to alter "the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983). Because of this power and responsibility, a legislature like the D.C. City Council cannot properly be characterized as a mere commercial buyer when it is considering legislation to set a specific price for a service to be provided to another branch of the government. Its decision, especially where an issue of Constitutional rights in involved, is never purely commercial. In each legislative enactment, it acts for the people.

The FTC suggests that a broad rule of exclusion from the antitrust laws for legitimate legislative petitioning will provide a loophole for, *e.g.*, insurance industry, (FTC Br. 34-35), or other conspiracies by powerful lobbies that will mask price fixing in the guise of an appeal for public and legislative support. Such appeals, we are warned, will inevitably be followed by coercive action against the

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[24] When it does, it is almost always due to public indignation at perceived waste and fraud. Such has nothing to do with this case.

[25] *See Pennington*, 381 U.S. at 663 (an alleged collusive bidding arrangement to drive low-bid coal suppliers from the spot market for coal purchased by the Tennessee Valley Authority would not be exempt from the antitrust laws).

[26] *See, e.g., United States v. Mobile Materials, Inc.*, 871 F.2d 902 (10th Cir. 1989) (Oklahoma Department of Transportation and Oklahoma Turnpike Authority).

public[27] and the legislature, coercion which will force the legislature to knuckle under to their demands. (FTC Br. 32-34). Based on the non-existence of such incidents of big business coercion by boycott in the legislative context at any time in our nation's history, the horrible is fanciful.

But assume that it is not. What makes the legislature unique among the branches of government is that it has the tools to prevent such coercion. As this Court recognized in *Buckley v. Valeo*, 424 U.S. at 25 (upholding in part and striking in part provisions of the Federal Election Campaign Act), Congress has the power to prevent corruption and the appearance of corruption spawned by real or imagined coercive influence. Because they can legislate to avoid or defeat coercion, legislatures cannot be coerced in the sense implied by the FTC.

If the City Council had been opposed to a fee increase, or if the CJA lawyers had sought an unrealistically high fee level, the City Council could have mounted its own publicity campaign. Media access is easier for it and an attack on the "over reaching" lawyers for the criminally accused might well have been received positively by the public. As Geoffrey Hazard observed, "the legislature is being asked to provide more money for lawyers for muggers." (C.A. App. 325). Or, the City Council could have authorized a new appropriation to expand the Public Defender Service, so that paid government employees took substantially more cases and the City would be less dependent on CJA lawyers. Alternatively, it could have legislated a community service program, directing that members of the D.C. Bar with relevant litigation experience take, say, three assigned indigent criminal cases per year for the existing or no fee. The record supports a finding that even if the strike were viewed as theoretical legislative coercion, there was no court "crisis."

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[27] The strike did not "coerce" the public as, for example, did the boycott, arguably, in *Claiborne* (*see infra*, pp. 30 n.29, 32-33). Coercion of the public is therefore irrelevant to this case.

How could there have been a crisis when so few qualified lawyers were invited to take cases, and when the court had the power it had exercised in 1974 over a two-month period to order lawyers to take CJA cases? (SCTLA Br. 16, n.7). Respondent Perrotta recognized from the beginning that if the Superior Court chose to exercise this power, which it might, it could break the strike (C.A. App. 451-52).[28]

If a new and sinister trust tries to abuse a rule which protects direct legislative boycotts, assuming it can overcome the hurdle of showing genuine petitioning, it can be neutralized by a new law rendering its objectionable conduct irrelevant or illegal. As long as that legislation is narrowly tailored to serve a substantial government interest, an interest in preventing a more precisely identified harm than eliminating boycotts merely because they put pressure on legislatures, as long as the restriction is unrelated to the suppression of free expression, and as long as meaningful alternative forms of expression are reasonably available to the potential boycotters, then the legislation could pass muster under the First Amendment. *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

There is nothing radical in concluding that the Sherman Act has recognized limits. The Sherman Act has been held not to reach local, violent conduct that more properly is addressed by state tort law, *Apex Hosiery*, 310 U.S. at 513; state action, *Parker v. Brown*, 317 U.S. 341, 352 (1943); or legislative petitioning, *Noerr*, 365 U.S. at 127. It would be more radical to conclude that the Sherman Act regulates the legislative petitioning in this case.

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[28] Judge Needelman, during testimony related to the D.C. government's ability to operate the criminal justice system through pro bono stated "I can't think of a single employer in the United States who has a better way to break a strike." (Tr. 1460 (Lefstein)).

II. THE STRIKE IS ALSO OUTSIDE THE SCOPE OF THE SHERMAN ACT BECAUSE ITS PURPOSE WAS TO GENERATE PUBLICITY, NOT TO APPLY ECONOMIC PRESSURE.

Even if a legislative boycott which is arguably self-interested and applies economic pressure is reached by the Sherman Act, when the challenged conduct, as here, is primarily *motivated* by a desire to engage in political expression, *Noerr* and *Claiborne* exclude it.

Noerr refused to extend the Sherman Act to concerted conduct designed to secure public support for anticompetitive legislation when such conduct did not involve direct economic pressure on the public. The conspirators' economic self-interest in securing legislation that would lessen competition was irrelevant. *Noerr*, 365 U.S. at 138-40. *Claiborne* recognized that even a boycott involving direct economic pressure on the public to support governmental action cannot be categorically prohibited under broad state economic regulation. *Claiborne*, 458 U.S. at 914. If the ultimate goal of the boycotters in securing governmental action is not lessening competition in the boycotted market, then *Claiborne* places such conduct beyond economic regulation. *Id.*; *see also Allied Tube*, 108 S. Ct. at 1941 (discussing *Claiborne*). *Claiborne* left open the possibility that conduct, the main purpose of which is exerting "economic pressure," could be prohibited when the ultimate goal is primarily economic self-benefit.

The Court of Appeals erred in classifying the strike as *Claiborne*-type "economic pressure", and engaging in an analysis of the strikers' ultimate goal in seeking the legislation, rather than focusing on the direct objective of the boycott.[29] It ignored the expressive component of

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[29] The rule below puts in doubt the *Claiborne* result if the Mississippi Supreme Court had found that the Sherman Act did apply. The conduct there did involve substantial economically self-interested behavior, (Cross Petition 3-6), and did involve signifi-

the strike aimed at the public (conduct not involving direct economic pressure on the public), and begged the question of whether the CJA lawyers were primarily engaged in *Noerr*-type conduct.

The Court of Appeals, in one possible reading of *Claiborne*, was correct in stating that "the motivation for the SCTLA boycott [is] a crucial factor in determining whether it constituted protected 'political' activity." (Pet. App. 40a-41a). But the proper motive test in a case where a single course of conduct has the potential to serve arguably both as political expression outside the scope of the Sherman Act under *Noerr*, and as economic pressure potentially within the scope of the Act, is a direct inquiry into whether the lawyers were primarily

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cant elements of economic pressure on the public outside of the legislative arena. (458 U.S. at 903-04.) *Claiborne* also demonstrates the inappropriateness of a market power test to determine whether a boycott is political. Had a market power test alone been employed to determine whether the *Claiborne* boycott was an antitrust violation, it might well have been found to have been illegal. Blacks in Claiborne County made up more than three-fourths of the population. *Claiborne*, 393 So.2d at 1294.

To the extent that *Claiborne* protects economically self-interested direct economic pressure, it cannot be distinguished merely because it involves a boycott seeking "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The record demonstrates that the Individual Respondents in this case sought to effectuate the Sixth Amendment rights of indigent defendants to effective assistance of counsel, which they and many experts and government officials believed to be threatened by inadequate rates of compensation. (*Supra* pp. 2, 3, 5-7). Whether the Sixth Amendment was in fact being systematically violated is irrelevant. The decision in *Claiborne* did not turn on whether the boycott in that case remedies a proven violation of the Fourteenth Amendment: the fact that the boycott was intended "to effectuate rights guaranteed by the Constitution itself" necessarily implicated political speech and petitioning. *Id.* at 914. The CJA lawyers, the experts, and government officials *believed* that Sixth Amendment rights would be undermined if rates of compensation under the CJA were not increased.

motivated by a desire to "express" or to "coerce." [30] If the primary *purpose* of engaging in a strike, as opposed to some other course of conduct, was to open the eyes of the media and the public to an unfair and possibly unconstitutional situation, and to stage an event that created a political climate within which Mayor Barry and the D.C. City Council could pass the legislation without fear of losing public support, then it is necessarily "politically motivated" and outside the scope of the antitrust laws.

> The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself. *Claiborne*, 458 U.S. at 914 (emphasis added).

The primary motive of the CJA lawyers was to influence public opinion through expression, not coercion. Unlike *Claiborne* and *NOW*, where the boycotters economically pressured members of the public to secure public support for their cause, the strike here could not have had any coercive economic effect on members of

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[30] This test is a variation on the application of the *Noerr* "sham" exception. The "sham" exception requires a factfinder to determine whether conduct "ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt" to inflict direct harm on a competitor. 365 U.S. at 144. Here, it has already been determined that the conduct was genuinely intended to secure governmental action; the issue is whether the claim of securing public support is a mere sham to mask the application of direct economic pressure. *See also Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.) (explaining predatory pricing analysis, which may require a factfinder to determine whether pricing that has an anticompetitive effect was motivated by a legitimate desire to compete, or by an illegal desire to monopolize), *cert. denied*, 434 U.S. 879 (1977). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring).

the public because the lawyers and the public were not in direct contact, and were not in the same economic "market place." The only component of the strike that could possibly have affected the public's position on the legislation was the expressive component. Because the boycott did not involve economic pressure as to the public, and was part of a genuine effort to secure legislation, it is the very activity protected in *Noerr*.

The record shows that the strike was a means, and the only effective means, of expressing the shared view of the CJA lawyers that the criminal justice system was unfair, that denying them a raise was unfair and that the situation had become so serious that a dramatic expression of protest was required to stimulate public awareness. The Court of Appeals acknowledged this when it found, in a separate analysis, that the "factual context" of the strike "suggests that the participants *intended* to communicate a message" and to "publicize the [lawyers'] claim that the prevailing CJA rates were inadequate." (Pet. App. 47a (emphasis added)).

The Individual Respondents were fully aware that individual CJA lawyers threatening to strike in isolation would not have been listened to attentively any more than if they had only been permitted to employ the "normal" forms of speech, less dramatic than a strike. They were told by an expert, Dean Branton, that something along the lines of a strike was their only chance to get the attention of the public and the legislators. (*Supra* p. 9). This advice was underscored by the Mayor's "knowing wink". (*Id.*) The Chief Judge said he would not speak out to the public on their behalf—even though he privately supported them. (*Supra* p. 8). Neither would the City Council or the Mayor without the reassurance of sympathetic public opinion. (*Supra* pp. 8-11) Without dramatic collective action, they had virtually no chance to appeal to the public. The media would not carry their message because it was not news and individ-

ual messages would have been too fragmented. The soundness of this judgment is demonstrated by a comparison of the number of stories carried by the *Washington Post* about the SCTLA legislative efforts during the 7½ *months* before the strike was announced—one (June 13, 1983, p. B2)—and the more than 19 stories carried during the 6 *weeks* after the strike's announcement (*supra* p. 4 n.5).[31]

The record shows the CJA lawyers intended the strike to accomplish two related objectives: (1) to communicate their position to the public; and (2) to create an event that the City Council could, assuming that public support warranted, declare an "emergency" within the meaning of D.C. Code Ann. § 1-229, and thereby invoke the emergency legislative powers to increase the CJA rates. Neither objective was, or was intended to be,

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[31] To condemn respondents' conduct under the antitrust laws would be particularly inappropriate here because the record demonstrates that respondents had exhausted all their alternatives and had no other viable means available to get their message to the public. (*Supra* p. 9). The media and the public are generally uninterested in the plight of criminal defendants—a politically disenfranchised group with "virtually no resources to mobilize in their own behalf with any effective means at all." (C.A. App. 282). When speaking out for the rights of this disenfranchised and extremely unpopular group, the CJA lawyers suffered a form of guilt by association and were similarly ignored. (C.A. App. 325; Pet. App. 191a). The dramatic effect of a boycott is its ability to overcome such entrenched public apathy, which explains why it has traditionally been a tool of the disenfranchised and economically powerless. (C.A. App. 272, 279, 286, 415-16). Under the FTC's reasoning, respondents would be denied the only effective means for engaging the public.

Legislative boycotts should be considered outside the scope of the antitrust laws as long as the boycott is reasonably calculated to secure the particular legislative relief being sought. Yet surely, at a minimum, the Sherman Act cannot proscribe this sole remaining avenue of effective political expression because, in theory, less effective avenues of communication remain open. *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988).

coercive. (C.A. App. 451-52). The CJA Lawyers announced their plans several weeks in advance of the effective date to encourage media attention well before the strike began, to allow, among other things, for orderly processing of indigent defendants after the strike, and to minimize the possibility of a "real" crisis, as opposed to a politically convenient "emergency".[32]

Like the publicity campaign in *Noerr*, the activity in issue here "[took] place in the open political arena . . . ." *Allied Tube*, 108 S.Ct. at 1940. The evidentiary record is clear that the strike was a "publicity campaign directed at the general public, seeking legislation." *Id.* at 1936, citing *Noerr*, 365 U.S. at 140-41. The strike was a choreographed dance, political theatre, not economic coercion.

It is unnecessary and irrelevant to inquire into whether the strikers were more self-interested than public-interested or whether they ultimately "coerced" or persuaded the City Council to raise the fees. Where, as here, the political boycott was intended to appeal to the public only through expression, it is "political activity" outside the scope of the antitrust laws.[33]

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[32] Respondent Koskoff went so far as to agree to represent an existing client *pro bono* during the strike. (C.A. App. 822-23).

[33] The fact that this politically motivated strike may have resulted in some direct pressure on the City Council and the Mayor is of no consequence:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.

Noerr, 365 U.S. at 143; *see also Allied Tube*, 108 S. Ct. at 1936 ("[W]here, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action.").

Let us assume, arguendo, that reaffirmation in this case that the Act does not proscribe petitioning boycotts directed to legislatures will, as the FTC fears, invite several pseudo-petitioning boycotts in the future which threaten both the public and the political process. If the antitrust laws today are not adequate to deal with this development, is it not then for the legislature, rather than the courts, to correct the problem by antitrust or other legislation? Although it has proven a constructive, durable and dynamic statute over the past 100 years, the Sherman Act has not been the last word on needed antitrust laws.

> Courts that refuse to make basic policy choices for the legislature thereby force the legislature to face and decide questions they had previously been content to leave unanswered. In this way the courts help focus the issues to be addressed and make the legislative process more responsible. R. Bork, *The Antitrust Paradox* 83 (1978).

If the CJA strike, or the variety of other legislative boycotts which have been an important part of our political heritage and which continue to be an integral part of our political life,[34] are to be subjected to the antitrust laws, if such a profound and radical political step is to be taken for the first time, it should be by a legislature, not the courts.[35]

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[34] These boycotts are important for the less advantaged especially as here and in *Claiborne*, where they seek to vindicate important Constitutional rights, and where the boycott provides the only means for obtaining legislative relief that has any chance to work. (Pet. App. 187a-189a).

[35] This Court has even limited the Sherman Act when doing so was illogical, but reflected proper deference to Congress. *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all of this, [exempting professional baseball from the antitrust laws] it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.").

III. IF THE SHERMAN ACT APPLIES, THE STRIKE MUST NOT BE AN ANTITRUST VIOLATION UNDER A RULE OF REASON STANDARD BECAUSE IT WAS NOT, ON BALANCE, ANTICOMPETITIVE IN PURPOSE OR EFFECT.

The FTC attempts to hide behind the *per se* rule because, in this case, it cannot prove that the Individual Respondents engaged in the strike with an intent to reduce competition, or that their strike had an anticompetitive effect. The *per se* rule should be applied only to practices that "always or almost always tend to restrict competition and decrease output." [36] A temporary strike, in the context of this case, is not such a practice.

The FTC has not identified the competition that the strike eliminated. There was no possibility of price competition among the CJA lawyers, because the fees were fixed by the legislature. In such circumstances, the only parameters of competition are quality and availability of supply. The legislatively determined fee was inadequate to permit quality competition. Rather, it drove the CJA lawyers to take too many cases and to cut operating costs and efforts expended. (Pet. App. 175a-177a). The hourly fee ceiling not only inhibited quality competition, it perversely affected the incentive structure to drive down the overall quality of CJA representation, and made CJA work unattractive to many quality and otherwise interested lawyers. (Pet. App. 176a). In focusing on the striker's goal of increasing the hourly fee for work per-

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[36] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979), *quoted in Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, ——, 108 S.Ct. 1515, 1519 (1988). As this court stated in *NCAA v. Board of Regents*, "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or of actual market analysis, the essential inquiry remains the same —whether or not the challenged restraint enhances competition." 468 U.S. 85, 103-04 (1984) (footnotes omitted).

formed, the FTC ignores the fact the Individual Respondents neither sought nor received as a provision of the legislation [37] an increase in the ceiling imposed on the annual CJA fees that could be earned by any one attorney. (C.A. App. 573). Many of the Respondents did not expect to work less or earn more as a result of the hourly fee increase. Rather, as Respondent Koskoff noted, they simply expected to be able to spend more time on fewer cases, providing better service, for what they had earned before. (C.A. App. 237). Thus, there was no competition in any relevant sense to be restricted by the strike.

One main goal of the strike for the Individual Respondents was to *increase* the number of qualified attorneys volunteering to take CJA cases. (*Supra* p. 5). This purpose was effected dramatically, by an approximate doubling of the number of attorneys daily seeking CJA appointments after the strike was settled. A related goal was to increase the quality of legal services provided to indigent clients. (C.A. App. 156-61). Expert testimony stated that this would be the result of raising the hourly fee level. (C.A. App. 325-26; Tr. 1539-40 (Lefstein)). The FTC offered no contrary evidence. (C.A. App. 140, 143, 161, 201-02).

The FTC asserts that the District's payment of higher fees is an anticompetitive effect of the strike.[38] But the FTC ignores the obvious fact that the District thereafter received an entirely different and higher level of CJA services under the new fee structure. Subsequently, the District enjoyed a much larger pool of qualified attorneys providing higher quality legal service. This Court recognized in *National Society of Professional Engineers v.*

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[37] Subsequent to the passage of the legislation, the Joint Counsel on Judicial Administration raised the ceiling from $42,000 to $50,000, although no request to do so was made by the CJA lawyers.

[38] Judge Needleman disagreed, concluding that "in the context of the special circumstances of this case, it cannot be presumed that the higher costs attributed to the 1983 boycott are adverse effects." (Pet. App. 228a-229a).

United States, 435 U.S. 679 (1978), that a "temporary and limited loss of competition" can serve to benefit *long-run* competition—and is therefore legal under rule of reason—where it "provid[es] incentives to develop [the] enterprise. . . . ." *Id.* at 689 (citing *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711)). That is exactly what happened here. By raising the CJA hourly fees, the District increased the supply of CJA attorneys and created a better opportunity for quality competition to occur, enhancing overall competition in the long run.

The absence of anticompetitive effects is not surprising here for three reasons. First, the absence of entry barriers made it impossible for such effects to develop. Typically, a price fixing conspiracy is designed to raise prices received by a limited group of suppliers who have the ability to prevent new entry from competing away the profitability of the price increase.[39] Here, however, the Individual Respondents wished to attract new entry, and the record shows that they were admirably successful in so doing.

Second, the ultimate effect—a higher hourly rate—was the result of legislation enacted by the City Council. As this court said in *Noerr*, 365 U.S. at 137 n.17 (citing *Parker v. Brown* 317 U.S. 341 (1943)), once passed, legislation is exempted state action. If the higher rate is the anticompetitive effect, it is caused by the intervening act of the legislature, not by the strikers. *Accord Kaiser Cement Corp. v. Fischbach and Moore, Inc.*, 793 F.2d 1100 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) (no injury where arbitration award had been based on amount arbitrators thought a fair contract price regard-

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[39] If entry barriers are low, the market power necessary to sustain collusion is unlikely to persist. *Statement of Federal Trade Commission concerning Horizontal Mergers*, 4 Trade Reg. Rep. (CCH) ¶ 13,200 (1982). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986).

less of alleged bid-rigging); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (intervening state action rendered non-justiciable alleged antitrust conspiracy to induce plaintiff to engage in conduct causing its nationalization).

Third, the Individual Respondents did not intend to restrain competition and it seems odd indeed to assume, as the application of a *per se* rule would, that such was their motive. Usually, those with anticompetitive intentions do not actively seek publicity and media coverage of their "conspiracy." Nor do they announce their plans well ahead of the effective date, in order to permit the intended victim to take steps to minimize, if not eliminate, the potential harmful effects of a conspiracy. It is also strange for the conspiracy to have, as an important objective, the immediate increase of supply. Finally, it is most unusual for conspirators with an economic stake in the success of the conspiratorial efforts not even to seek a higher ceiling for permitted yearly earnings.

The coexistence of these facts makes the inference of anticompetitive purpose "implausible." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986). Any minimal restrictive effect of a joint program to withhold labor is, in the context of this case, ancillary to the main purpose of increasing the quantity and quality of lawyering.[40]

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[40] The FTC's reliance on *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), is misguided. The CJA lawyers do not argue that the harm caused by unrestricted competition outweighs its presumed benefits, (although such might be the very case in which the Constitutional concerns for free speech and adequate legal representation for criminal defendants could combine to outweigh the economic benefit of competition, if this boycott had had the goal of restricting competition). The CJA lawyers were not concerned with a social harm caused by competition, but with the *lack* of effective competition resulting from the legislature's setting an unreasonably low rate. This Court distinguished the canon of ethics in *Professional Engineers*

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and this case should be dismissed.

Respectfully submitted.

DOUGLAS E. ROSENTHAL
(Counsel of Record)
ROBERT A. LIPSTEIN
STUART A. SALEN
COUDERT BROTHERS
1627 I Street, N.W.
Washington, D.C. 20006
(202) 775-5100

August 1, 1989

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from the restriction in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) on the basis that the latter had "a positive effect on competition." *Professional Engineers*, 435 U.S. at 693 n.19 (1978). That was the intended and actual effect of the CJA lawyers strike.

FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

(13) (12)

Nos. 88-1198 and 88-1393

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KEVIN J. ARQUIT
General Counsel
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2481

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FEDERAL TRADE COMMISSION

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REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The only conduct challenged by the Commission in this case was a concerted refusal by competing private practice attorneys to provide their professional services to the District of Columbia "unless we are granted a substantial increase in our hourly rate" (Pet. App. 78a). As a result of this conduct, the District of Columbia was denied the services of nearly every attorney who had theretofore chosen to make a practice of accepting CJA assignments. Only when it increased the CJA rate was the District again able to retain the services of the boycotting lawyers.

In the court of appeals' words, "[t]his constriction of supply is the essence of 'price-fixing' " (Pet. App. 16a) and "could properly be condemned as a *per se* violation of Section 1 of the Sherman Act unless it also comes within the protection of the First Amendment" (*id.* at 32a). Respondents and their amici[1] have failed to identify any existing principle of Sherman Act construction or First Amendment law that would warrant either absolute immunity, or exemption from *per se* condemnation, for the price-fixing boycott in which they engaged.

1.a. The court of appeals (Pet. App. 45a), the Commission (*id.* at 123a), and the administrative law judge (*id.* at 216a), all recognized that to grant antitrust immunity to respondents' boycott would entail an extraordinary expansion of the *Noerr* doctrine. As our opening brief demonstrated, the *Noerr* doctrine does not protect "price-fixing agreements, boycotts, market-division agreements, and other similar arrangements" even if they are an integral part of a campaign to exert pressure on a legislature (*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961)). *Noerr* assures only that the Sherman Act's prohibition against "conspirac[ies] * * * in restraint of trade" (15 U.S.C. 1) cannot be construed to prohibit agreements by businessmen "jointly to seek legislation or law enforcement" (365 U.S. at 136) through the same "otherwise lawful" (*id.* at 138) means of publicity and persuasion that all citizens have at their disposal.[2]

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[1] Respondent Superior Court Trial Lawyers Association (SCTLA) and the individual respondents (Ind.) have filed separate briefs. *Amicus* briefs supporting respondents have been filed by: the Washington Council of Lawyers et al. (WCL); the American Medical Association (AMA); the American Civil Liberties Union (ACLU); and the National Association of Criminal Defense Lawyers (NACDL).

[2] Amicus WCL ignores this point when it argues (Br. 8) that to deny the possibility of *Noerr* immunity for price-fixing and other classic trade restraints would deprive *Noerr* of content because *Noerr* comes into play only when conduct that would "otherwise violate the antitrust laws" is involved. In fact, traditional joint lobbying and publicity campaigns to achieve anticompetitive legislation could easily have been held to "violate the antitrust laws" but for *Noerr*'s rejection of such an "expansive" construction of the Sherman Act (365 U.S. at 136).

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 108 S.Ct. 1931 (1988), confirms that *Noerr* affords no immunity for naked horizontal restraints of trade such as price-fixing and output restrictions. In *Allied Tube,* the Court addressed and rejected an argument similar to one respondents make here: that *Noerr* immunizes "every concerted effort that is genuinely intended to influence government action" (108 S.Ct. at 1938).[3] The Court noted that this "absolutist position" (*ibid.*) would immunize, *e.g.*, "horizontal output restrictions on the ground that they are intended to dramatize the plight of [an] industry and spur legislative action" (*id.* at 1939). Instead, this Court held that the legality of genuine efforts to influence legislation must depend on the "context and nature of the activity" (*ibid.*). The Court's reference to "context and nature" was plainly not designed, as SCTLA and WCL contend (SCTLA Br. 24; WCL Br. 8-9), to raise the novel possibility that price-fixing and horizontal output restrictions designed to obtain a price increase could be deemed protected conduct under some circumstances. Rather, the Court was explaining that activities of this "nature" are not immune under *Noerr* even though they may be "genuinely" intended to "spur legislative action" (108 S. Ct. at 1939).[4]

In an effort to bring themselves within *Noerr*'s ambit, petitioners insist that a principal purpose of their concerted refusal to deal was to influence the legislature by eliciting publicity and public support for their position (*e.g.*, Ind. Br. 34-35; SCTLA Br. 25). This argument in unavailing because, as the Court in *Noerr* emphasized, the publicity campaign there involved no agreement by the participants to "jointly give up their trade freedom" (365 U.S. at 136). The only "contract, combination

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[3] Compare, *e.g.*: "genuine efforts to petition the legislature are not within the scope of the Sherman Act" (SCTLA Br. 23); "a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act" (Ind. Br. 14).

[4] This is further apparent from the majority's criticism of the dissent (108 S. Ct. at 1941 n.10) for not offering an alternative to distinguish those "non-immune activities [output restrictions and others] from the activity at issue in this case."

* * * or conspiracy" in *Noerr* was the joint conduct of the parties in placing advertisements designed to influence public and legislative opinion in their favor. Here, by contrast, respondents collectively withheld their services from a buyer until it agreed to pay a higher price for them. This was an "agreement[] traditionally condemned by § 1 of the [Sherman] Act" (365 U.S. at 136).[5] Whether and to what extent this classic trade restraint was intended to, or actually did, elicit publicity or public support for respondents' cause is simply irrelevant.

It likewise makes no difference to the legality of respondents' boycott that, in their view, the boycott was "the only effective means" (Ind. Br. 33) or "require[d] * * * to mobilize the political support necessary for [] passage" of a fee increase (SCTLA Br. 24; see also AMA Br. 14; ACLU Br. 10). Nothing in *Noerr* suggests that the right to petition the government includes the right to use whatever techniques one feels necessary to petition successfully (Pet. App. 123a).[6] Surely no one would suggest that a political group or advocacy organization might, by leave of the First Amendment, block entry to the offices of D.C. councilmembers, spray-paint pleas for more money on

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[5] Although the trucker-plaintiffs in *Noerr* contended that the railroads' use of the so-called "third party technique" ("giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups" (365 U.S. at 140)) was unethical, the Court noted that "insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity and * * * a publicity campaign to influence governmental action falls clearly into the category of political activity." The Court also emphasized the lower court's apparent rejection of the proposition "that the use of the third-party technique alone could constitute a violation of the Sherman Act." (365 U.S. at 140-141.)

[6] Respondents cannot claim that they had no significant means available to them other than a boycott by which to express their views. The record shows that prior to the boycott they collectively met with numerous City officials and influential members of the public, and secured introduction of legislation to effect the changes they desired (Pet. App. 6a-7a). Plainly, they enjoyed far greater access to the legislative process than many persons do. Respondents' complaint is simply that the lawful means of communication at their disposal had not resulted, as of September 1983, in passage of the legislation they desired.

the walls of the District Building, or violate traffic or park service regulations because they had grown dissatisfied with the results of lawful lobbying activities and sincerely believed they had "no other viable means available to get their message to the public" (Ind. Br. 34 n.31). Lawyers enjoy no greater right to employ price-fixing as a means of putting pressure on the legislature.

It would not affect the legality of the boycott under *Noerr* if, as SCTLA contends, "the perception of government officials" was "that they [we]re being lobbied rather than coerced" (SCTLA Br. 30).[7] Despite SCTLA's disavowals, this argument is but a restatement of the rejected view that the "knowing wink" of city officials (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-227 (1940)), or a target's ultimate acquiescence in a boycott, makes the boycott legal. By this logic, any boycott, public employee strike, office blockade, graffiti campaign, or other statutorily prohibited act committed in a sincere effort to influence the legislature would become "legitimate political activity" and gain First Amendment protection so long as the target government chose to overlook the unlawfulness of the conduct and address the merits of the legislative demands at issue.

To soften the anarchic implications of their position, respondents insist that "boycotts promoting legislation" have

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[7] The Commission, of course, rejected this conclusion. It noted that despite widespread support for increased CJA funding, the City Council, for budgetary reasons, declined to increase the rate until a boycott created the imminent prospect of a court crisis (Pet. App. 96a-97a). We also note that (1) Chief Judge Moultrie, in his own words, was "unalterably opposed to * * * an organized boycott" as a means of raising the CJA rate (Pet. App. 81a & n.47) and (2) neither Mayor Barry nor any member of the D.C. City Council is on record as supporting the SCTLA boycott specifically, or supplier boycotts (or public employee strikes) generally, as a way to prod timorous legislators to act in the public interest "without fear of losing public support" (Ind. Br. 32). Respondents' interpretation of remarks they attribute to the Mayor (SCTLA Br. 12-13, 29) is solely their own. The only public officials who *have* made an appearance in this proceeding have unequivocally opposed SCTLA's contention that joint supplier refusals to deal are a lawful means of persuading a legislature to increase prices. See Brief of 14 States as Amici Curiae in Support of Petitioner (June 22, 1989).

"been a part of the legitimate political heritage of our nation since its foundation" (Ind. Br. 23; see also WCL Br. 9) and are thus either constitutionally protected, or were never meant to be covered by the Sherman Act at all (Ind. Br. 20-24). But the "boycott" in this case, unlike the various consumer boycotts and tax protests cited by Individual Respondents (Br. 20-24) was "the essence of price-fixing": an agreement by economic competitors to withhold supply in order "to profit financially from a lessening of competition in the boycotted market" (*Allied Tube*, 108 S. Ct. at 1941). Respondents offer no evidence that this kind of conduct enjoys an honored place in the history of political protest. To the contrary, "the Congress that enacted the Sherman Act intended to make naked price-fixing agreements illegal per se" (R. Bork, *The Antitrust Paradox* 66 (1978)), and as the court of appeals demonstrated (Pet. App. 16a-32a), the conduct in this case is a "classic" example of the conduct covered by the language of the Sherman Act.[8]

It may well be true, as respondents maintain, that the years before passage of the Sherman Act in 1890 saw few if any instances of public price-fixing boycotts directed at legislatures

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[8] As noted in our opening brief (FTC Br. 10 n.11), the price-fixing here took the form of a "boycott" only because, in the market for indigent legal services, like many others, the buyer (rather than the seller) posts a price, sellers decide whether to supply at that price, and the buyer adjusts the price if the free play of competition (or, as here, a seller's cartel) does not yield an adequate supply (see also Pet. App. 86a).

SCTLA's suggestion that "caution in applying the antitrust laws" is warranted because the boycott was "open and notorious" (SCTLA Br. 28) is plainly wrong. Price-fixing often occurs in the open because the participants are insensitive to the legal significance of their conduct. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783 (1974) (published bar association fee schedule is "a classic illustration of price-fixing"); *San Juan Racing Ass'n* v. *Associacion de Jinetes*, 590 F.2d 31, 32 (1st Cir. 1979) ("openness does not immunize agreement"); Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405, 417 (1978) (civil, rather than criminal suit may be warranted because "[o]ccasionally defendants engage in per se price-fixing, but their conduct clearly indicates that they had no idea they were violating the antitrust laws. There may, for instance, have been open and widely advertised public meetings among a group of naive businessmen without an antitrust counsel").

(Ind. Br. 21 & n.16). But that sheds no light upon the intended reach of the Sherman Act. Governments in the 19th century did not spend millions of dollars to purchase the services of private-practice lawyers, doctors, and other businesspersons. Today, by contrast, government purchases account for more than a fifth of the gross national product – over $900 billion (United States Bureau of the Census, *Statistical Abstract of the United States: 1989,* at 421 (109th ed. 1988)). "Congress intended to strike as broadly as it could in § 1 of the Sherman Act" (*Goldfarb* v. *Virginia State Bar,* 421 U.S. at 787). The Act's reach cannot be limited even if, in the "modern world" (*id.* at 788), the targets and perpetrators of price-fixing are not always the same as they were before 1890.

Similarly unavailing is the contention that the SCTLA boycott deserves *Noerr* immunity because the legislature can always "legislate to * * * defeat coercion" (Ind. Br. 28) and thus "do[es] not need protection against economic pressures" (ACLU Br. 6; see also SCTLA Br. 28). Congress has already legislated – in the Sherman Act – to protect all buyers, including legislatures, from collusive refusals to deal by those who supply needed goods and services.[9] If the Constitution forbids application of the Sherman Act to public price-fixing boycotts against the legislature on grounds that such economic behavior is protected political communication, the First Amendment would presumably invalidate whatever other statute a legislature might fashion to protect itself from such conduct.

Respondents also appear to mean by their "protect itself" defense that the D.C. City Council might have taken steps to reduce its demand for the CJA lawyers' services, *e.g.*, by proposing "a large increase in the PDS appropriations" (SCTLA Br. 28-29 n.16) or legislating a new "community service program" involving compulsory representation of indigents by

[9] The *Noerr* doctrine, of course, is not limited to efforts to petition the legislature. See *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965). Likewise, respondents' "protect itself" argument would apply to any publicly conducted price-fixing against an executive branch agency, since presumably the legislature could "protect" the executive in the same ways that respondents suggest it should be able to protect itself.

selected members of the bar (Ind. Br. 28). Respondents' argument is akin to contending that a bakers' boycott is legal because the populace could survive or even defeat the boycott by eating rice or baking their own bread. The alternatives available to the City to break the SCTLA boycott carried with them high costs and significant drawbacks (Pet. App. 158a-161a, 205a-206a). The City chose to pay the $4-5 million annual cost of a CJA rate increase rather than the cost in dollars of enlarging the Public Defender Service or the cost in civic turmoil of a massive lawyers' draft.[10] This hardly demonstrates that the City was not entitled, like any buyer, to antitrust protection from the boycott in the first place, or that the boycott was immune under *Noerr*.

b. Respondents fare no better in their effort to bring themselves within the scope of *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). Although a higher CJA rate was the explicit object of their boycott, the individual respondents attempt to demonstrate that, at least for some of them, earning more money was of secondary concern to their desire to improve the quality of CJA representation. But nothing in respondents' briefs provides reason to doubt the conclusion, reached by both the Commission and court of appeals after

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[10] SCTLA claims that the 1974 draft (imposed during a lapse in CJA appropriations) proves that a draft would have succeeded in 1983 (*e.g.*, Br. 48-49 n.36). But Chief Judge Moultrie drew a different conclusion. Because of "strenuous" resistance to the 1974 draft ("[o]nly 43% of the attorneys summoned actually reported" (Pet. App. 159a) and the D.C. Bar filed a court challenge (Tr. 1078)), Judge Moultrie, long before the 1983 boycott "had indicated an unwillingness to impose similar drafts" (Pet. App. 160a; see also Pet. App. 52a). Moreover, even a "successful" draft, in which several hundred "uptown" lawyers each handled a few cases, would not have provided the same level of representation as the CJA program. SCTLA's own witness acknowledged that a lawyer "cannot maintain awareness and proficiency in regard to such matters [criminal defense work] unless you are continuously involved in them" (Tr. 1143-1144 (Hazard); see also Tr. 244-245, 272-273 (Carter)).

careful consideration, that "the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).[11]

Although the CJA lawyers' manifest economic interest in their boycott makes this case an easy one, subjective motivation should not ever be the test. It is "well settled that good motives will not validate an otherwise anticompetitive practice" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984) (citing cases)). When competing suppliers "jointly give up their trade freedom" by collectively withholding their services from a buyer—whether it be the legislature or any other—they engage in economic behavior. Society may regulate or prohibit such economic behavior, even if it is used in an effort to communicate or to influence the political process, and regardless of the ratio of avarice to idealism that motivates it. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212, 225-226 (1982) (politically motivated secondary boycotters with *no* economic interest denied First Amendment protection).[12]

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[11] Respondents' selective and in some cases misleading recasting of the evidence provides no basis on which this Court could reverse this finding, even were it to accept respondents' request to review it *de novo* (Ind. Br. 19 n.12). To cite but one example, respondents claim "many" of them "did not expect to * * * earn more as a result of the hourly fee increase" because the boycott did not demand an increase in the yearly maximum cap on CJA earnings (Ind. Br. 38). Respondents fail to disclose that the pre-strike cap on CJA earnings was well above the pre-boycott earnings of most CJA lawyers. Thus, only the hourly CJA rate (the sole focus of the boycott) determined how much most CJA lawyers earned; the yearly cap was not a constraint. Moreover, the yearly cap was set administratively, not by legislation. Shortly after the City Council raised the hourly CJA rate, the yearly cap was also increased (to $50,000). (See Pet. App. 170a.)

[12] Respondents observe that the First Circuit's decision in the *Longshoremen*'s case dismissed an antitrust count (Ind. Br. 23-24 n. 21; SCTLA Br. 40 n.30). That does not aid respondents because the court's holding rested on its finding that the longshoremen's boycott was "ill-designed as a means of gaining a competitive or commercial advantage for the union or its members" (*Allied International, Inc.* v. *International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981)). Moreover, the holding was "fortified" by the fact that the boycott violated provisions of the Labor Management Relations Act that were " 'enacted as an alternative to subjecting unions

2. Just as respondents have shown no basis for absolute antitrust immunity for their conduct, so, too, have they failed to show any reason why their conduct should escape the summary condemnation (without regard to market power) that the Sherman Act prescribes for naked horizontal restraints on price and output.

Respondents do not question seriously the court of appeals' conclusion that theirs was a "naked" horizontal restraint. As the court found, "petitioners have advanced no claim that their boycott was ancillary and necessary to some larger, cooperative venture that permitted them to operate more efficiently" (Pet. App. 21a-22a). As the court of appeals further noted after reviewing this Court's decisions, the economic wisdom of the *per se* prohibition of horizontal restraints on price or output has been reexamined only "in the context of horizontal restraints that were 'ancillary' to 'an integration of the economic activities of the parties and appear[ed] capable of enhancing the group's efficiency' " (Pet. App. 21a, quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986)).[13]

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to antitrust liability for secondary activities' " (*id.* at 1381). Given the common purpose of anti-trust and anti-strike laws, there is no logical reason whatsoever why the First Amendment should be applied differently to them.

[13] In some cases in which this Court has examined proffered procompetitive justifications for naked horizontal restraints, it has described its analysis as involving the "rule of reason." But the "rule of reason" analysis performed in these cases considers only the alleged justifications; if they are found meritless, condemnation of the practice follows without proof of market power. See, *e.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110. The AMA tries to exploit this variance in terminology by arguing that in *Michigan State Medical Society*, 101 F.T.C. 191 (1983), "the Commission saw fit to apply the rule of reason" (AMA Br. 24). This statement is true, but misleading in the present context. *Michigan State* involved a threatened Medicaid boycott. The Commission's "rule of reason" analysis entailed examination of "asserted pro-competitive justifications" for the threatened boycott (101 F.T.C. at 291). Upon rejecting these, the Commission held the conduct unlawful without any market power inquiry (*id.* at 289-296).

Respondents suggest that their boycott was pro-competitive because the higher price they achieved resulted in "an entirely different and higher level of CJA services" and "a much larger pool of qualified attorneys providing higher quality legal service" (Ind. Br. 38). It would not be surprising if a 75% increase in the price of a service attracted new providers and increased quality.[14] But this Court has rejected such a "justification" for price-fixing as a "frontal assault on the basic policy of the Sherman Act" (*National Society of Professional Engineers* v. *United States*, 435 U.S. at 695).[15]

The contention of respondents and the court of appeals that application of the *per se* rule to this case is impermissible under *United States* v. *O'Brien*, 391 U.S. 367 (1968), has been undermined further, rather than assisted as SCTLA maintains (Br. 45), by this Court's recent First Amendment decisions. As this Court has made clear, the *O'Brien* test for evaluating regulation of allegedly expressive conduct is a "relatively lenient" one (*Texas* v. *Johnson*, 109 S.Ct. 2533, 2540 (1989)). It requires not that a regulation be the "least restrictive" or "least intrusive" means of accomplishing an end, but only that it reflect "narrow tailoring" to achieve the government's purpose (*Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2757-2758 (1989)). And the "requirement of narrow tailoring is satisfied 'so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " (109 S.Ct. at 2758, quoting *United States* v. *Albertini*, 472 U.S. 677, 689 (1985); see also *Board of Trustees, State Univ. of N.Y.* v. *Fox*, 109 S.Ct. 3028, 3033-3034 (1989).

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[14] For a more balanced assessment of the actual impact of the increased CJA fee than respondents provide, however, see Pet. App. 207a-208a ("a dramatic transformation in the quality of indigency practice is unlikely").

[15] Equally misplaced is the AMA's suggestion that price-fixing boycotts against the government may be pro-competitive because they alert the government that it is spending too little on the good or service subject to the boycott (AMA Br. 18-19). The AMA has it backwards. Our economic system relies on the results of competition, not collusion, to let buyers know whether they are offering enough for a particular good or service (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n.27).

As we observed in our opening brief, the Sherman Act, as construed by this Court in *Noerr* and *Claiborne Hardware*, has already been tailored to accommodate the speech rights of competitors with the antitrust rights of the public (FTC Br. 26).[16] The further "tailoring" demanded by respondents can only be achieved at a very great cost to statutory clarity and effective law enforcement.

Respondents suggest essentially three reasons why the *per se* rule is unconstitutionally overbroad. First, in their view, "legislative petitioning boycotts" as a class are unlikely to present the same threat to competition as other price-fixing boycotts do. This is so, respondents claim, because, "the predominant effects upon consumers flow from governmental action and are likely to be quite different from those usually associated with a cartel" (SCTLA Br. 33; see also Ind. Br. 39), and because "petitioning boycotts" must depend for their success on "persuasion" rather than "coercion," so that presumptions about the exercise of market power that underlie the *per se* rule do not apply (*e.g.*, SCTLA Br. 35). This logic is flawed.

The "predominant effects" of a "petitioning" price-fixing boycott, like the effects of any other price-fixing boycott, flow from collusive *private* action: a purchaser is denied the freedom to obtain goods or services in a competitive market unless it pays more for them.[17] Whether (and to what unquantifiable degree) such concerted disruptions of supply "coerce" or "per-

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[16] WCL's observation that "*Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*" (WCL Br. 23) makes our point precisely. As we showed in our opening brief (at 17-24), this Court has repeatedly made clear that the "political boycott" doctrine announced in *Claiborne Hardware* does not apply to price-related competitor boycotts. In announcing that *O'Brien* does apply to this case, the court of appeals disregarded the manner in which this Court has already applied *O'Brien* to the antitrust laws.

[17] The purchaser (and victim) need not be a legislature. Respondents' definition of a "petitioning boycott" includes any concerted refusal to deal designed to influence legislative action, whether the purchaser is the government, as here, or individual consumers, as in a concerted gasoline station shutdown undertaken to induce relaxation of legislative price controls.

suade" the legislature to act, there is no reason to assume that, as a class, they pose a lesser economic threat than any others.[18]

Respondents' second contention is simply that as applied to *this case*, the *per se* rule is overbroad because the conduct here is not harmful. This begs the question (and is also incorrect as we discuss elsewhere). The point of *United States* v. *Albertini, supra, Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *O'Brien* itself, is that content-neutral prohibitions of generally harmful conduct can be upheld against the "limitless variety" (391 U.S. at 376) of potential "expressive conduct" claims, without demonstration in each particular case that the proscribed conduct causes the underlying harm that the legislature sought to prevent.[19]

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[18] Respondents' contention that the legislature can "protect itself" provides no basis for distinction in this context. As we noted earlier (pp. 7-8, *supra*) legislatures must ordinarily pay a price—in money or civic turmoil—if they seek to break a boycott. State and local governments are thus no less presumptively immune to the exercise of market power than resourceful private parties. Respondents also suggest that expressive price-fixing is less worrisome than other price-fixing because it is "a traditional tool of the disenfranchised" (SCTLA Br. 44) and "picturesque 'little people' in the Jeffersonian tradition" (*id.* at 41). In the Commission's experience, however, such boycotts are more often engineered by some of society's most privileged members—lawyers, doctors, and other professional elites. *E.g., Michigan State Medical Society, supra*; FTC Br. 33 n. 28. Although SCTLA disputes our belief that price-fixing boycotts against the government are infrequent because most people consider them unlawful (Br. 41), amicus AMA confirms our view. The AMA cautions its members (presumably reflecting its understanding of what the law requires) "to avoid activities that could be characterized as a collective refusal to deal with governmental or private payo.s" (AMA Br. 24 n.17).

[19] *Clark* illustrates the point notwithstanding WCL's claim (Br. 27-28) that it involved some "proven danger" not present here. In *Clark*, the Park Service had permitted homeless persons to conduct a 24-hour vigil in Lafayette Park. The protestors argued it would do no incremental harm to the Park were they to violate a regulation against "overnight sleeping" during the permitted vigil. Without refuting that plausible premise, this Court held that "the validity of this regulation need not be judged solely by reference to the demonstration at hand" (468 U.S. at 296-297).

Respondents and amici inaptly seek refuge from *Clark* and *Albertini* in this Court's observation that "[a] complete ban can be narrowly tailored * * * only

Finally, respondents suggest that the *per se* rule should be deemed unconstitutional as applied to the present boycott by approximately 100 CJA lawyers (comprising nearly all those who made a practice of CJA cases at the time) because otherwise the law would prohibit totally inconsequential boycotts by only "two" (SCTLA Br. 38) or "five" (WCL Br. 14) lawyers out of 100, and "no matter how brief in duration their boycott is" (SCTLA Br. 46).[20] But many laws have *de minimis* applications that do not make such laws unconstitutional. If two federal employees went on strike for one day to express their view on an issue of public importance, they would be violating the *per se* federal employee anti-strike law (see 5 U.S.C. 7311). That hypothetical possibility surely does not call into question application of the law to indefinite strikes by 100 or 1000 or 10,000 employees.[21]

Of course, the *de minimis per se* price-fixing boycotts imagined by respondents, like *de minimis* strikes, seldom if ever occur, because two or five lawyers acting alone in a market served by 100 lawyers would have no reason to believe that a concerted

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if each activity within the proscription's scope is an appropriately targeted evil" (*Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502-2503 (1988); see, *e.g.*, SCTLA Br. 45). The Court has construed this statement to mean only that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals" (*Ward* v. *Rock Against Racism*, 109 S.Ct. at 2758). The *per se* rule against price-fixing, like *per se* laws against strikes, speeding, and sleeping overnight in the parks, satisfies that standard even though not every single instance of the conduct prohibited by such laws necessarily causes the substantive harm at which the categorical prohibitions are directed.

[20] In fact, respondents' boycott was neither "limited in duration" (SCTLA Br. 41) nor a "temporary strike" (Ind. Br. 37). The boycott was designed to last, and did last, for as long as it took the target to agree to increase its price. No price-fixing boycott ever lasts any longer than this.

[21] SCTLA suggests, with no support, that "prosecutorial discretion" is not an adequate answer to *de minimis* applications of the antitrust laws (as it is for all other laws), because the antitrust laws are privately enforced (SCTLA Br. 38 n.27). But an alleged Sherman Act violation may be privately challenged only by a person who is "injured" (15 U.S.C. 15) or can show "threatened loss or damage" (15 U.S.C. 26). Private enforcement in *de minimis* cases is therefore not a concern.

refusal to deal could have any effect. By contrast, the administrative law judge found that "[t]he expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system. This expectation was fully realized • • •" (Pet. App. 195a).[22]

The Commission certainly does not maintain that *Albertini* and related cases eliminate any need for the government to distinguish the harmful from the harmless unless it can do so "at no cost whatsoever" (SCTLA Br. 43). Our point is that sacrificing the protections of the *per se* rule in the case of public price-fixing boycotts against the government (or even just the legislature[23]) would impose substantial and potentially debilitating costs upon antitrust enforcement—as well as create substantial uncertainty for those who must obey the law. As this Court has recognized (*Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958)), *per se* rules spare courts and litigants

> the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

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[22] To overcome this and related findings of the Commission (see FTC Br. 41), respondents now assert that their boycott did not result in a 'real' crisis", but only "a politically convenient 'emergency' " (Ind. Br. 35; see also *id.* at 28-29). They buttress this assertion with the claim that no indigent defendant was denied counsel during the boycott (*id.* at 12; see also SCTLA Br. 14). This last statement, unlike the first, may be true. Denying counsel to an indigent would have required dismissal of the charges against him. When the point came during the boycott at which the Chairman and Director of the PDS represented to the Mayor and City Council that this intolerable result was imminent, owing to the exhaustion of the resources of PDS attorneys and those few CJA regulars who did not join the boycott (see Pet. App. 197a-200a), the City agreed to increase the CJA rate.

[23] Although respondents note that many government purchases are made by executive agencies acting pursuant to nonspecific appropriations (Ind. Br. 26-27), all such appropriations ultimately derive from legislatures. Many overt or covert boycotts now aimed at influencing executive bodies could easily be restructured to assume the form of a demand for legislation if that were made a basis for relaxed antitrust treatment. See also note 17, *supra*.

The magnitude of the costs and uncertainty imposed on antitrust enforcement by the market power requirement respondents advocate is best illustrated by the dizzying array of facts that they themselves apparently consider relevant to determining whether an alleged "petitioning boycott" would be lawful under the Sherman Act (*e.g.*, SCTLA Br. 1-20; Ind. Br. 2-12). The record of this case shows an agreement by competing private practice attorneys to withhold their services from the government unless it increased its price for their services (Pet. App. 8a-9a). The attorneys comprised nearly 100% of those who made a practice of providing the vital service in question (*ibid.*). The attorneys "expected" that their boycott would seriously affect the City (by depriving the court of an adequate supply of attorneys) (*id.* at 195a), and within two weeks of the boycott's commencement precisely that effect had occurred: the head of the Public Defender Service announced that a "crisis" (*i.e.*, an insufficient supply of lawyers to satisfy the constitutional requirement) was imminent (*id.* at 9a-10a). Only when the price for their services was increased did the lawyers' boycott end (*id.* at 11a).

Ordinarily the facts above would more than suffice to demonstrate both a *per se* violation of the antitrust laws and adverse effects necessary to obviate any showing of market power under a full rule of reason analysis. See, *e.g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). In respondents' view, however, the tribunal must further decide (1) whether the concerted refusal to deal is a "legislative petitioning boycott" and (2) if so, do the boycotters have "market power?" To describe these inquiries as a "sea of doubt" understates their complexity.[24]

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[24] In respondents' view, to determine whether the price-fixing boycott in question was a "petitioning boycott," the tribunal must scrutinize the motives and attitudes of both the boycotters and officials of the target government. Did the boycotters seek to "communicate" or to "coerce" when they withheld their services? And did officials of the targeted government feel "coerced" or "persuaded" by the boycott? If one rejects the pragmatic, objectively based analysis of these questions performed by the Commission and ALJ (see FTC

The argument for increasing CJA rates in 1983 no doubt had much to commend it. But every dollar that the City was required to pay to end a lawyers' boycott left it with that much less money to spend to feed the hungry, shelter the homeless, fight drugs, disease, and crime, or accomplish any number of other perennially underfunded public missions that compete with indigent legal care for limited public funds. The antitrust laws exist to ensure that, in allocating scarce resources, governments and all other purchasers enjoy the benefits of competition among suppliers. As this Court has observed, the Sherman Act

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

NCAA v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n. 27, quoting *Northern Pacific R.R.* v. *United States*, 356 U.S. at 4-5.

The assurance of the lawyers and doctors appearing before this Court that their causes are unique and their claims on the public purse are uniquely compelling cannot justify the unprecedented antitrust treatment they demand. The "economic liberty" that the Sherman Act guarantees all buyers (*NCAA*, 468 U.S. at 104 n.27) need not be subordinated to the novel right to engage in

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Br. 41-42), as respondents do, the result is an inquiry of inordinate complexity, that reduces the tribunal to measuring the sincerity and authenticity of "smil[es]" (SCTLA Br. 13), "hand[shakes]" (*id.* at 17), and "cocktail reception[s]" (*id.* at 18), to arrive at the appropriate mode of antitrust analysis.

If the conduct is determined to be a "petitioning boycott," the tribunal must then assess market power. SCLTA apparently maintains that the fact that a D.C. bar member did not compete for CJA assignments prior to the boycott would not warrant exclusion from the market (Br. 48 n.35). While rejecting this usual test of market participation, however, SCTLA does not explain how else one decides which of 14,000 D.C. Bar members were market participants and which were not.

"expressive price-fixing" demanded by the respondents in this case.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.[25]

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
KEVIN J. ARQUIT
General Counsel
Federal Trade Commission

AUGUST 1989

[25] We agree with respondents (SCTLA Br. 21 n.10; Ind. Br. 13 n.6) that in such event the case should be remanded to the court of appeals to consider respondents' unaddressed objections to the scope of the order to cease and desist against them.

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00405

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1198, 88-1393

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1988

FEDERAL TRADE COMMISSION

Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,

Ralph J. Perrotta
Karen E. Koskoff
Reginald G. Addison
Joanne D. Slaight

Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF 14 STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

ROBERT K. CORBIN *
Attorney General
State of Arizona
ALISON J. BUTTERFIELD
Chief Counsel, Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4751

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

*Counsel of Record on Behalf of Amici States

June 22, 1989 (Additional Counsel Listed Inside)

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LIST OF COUNSEL

Counsel for the State of Alaska

DOUGLAS B. BAILY
Attorney General
RICHARD D. MONKMAN
Assistant Attorney General
P. O. Box K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for the State of Colorado

DUANE WOODARD
Attorney General
THOMAS P. McMAHON
First Assistant Attorney General
Chief, Antitrust Unit
Colorado Department of Law
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
(303) 866-5158

Counsel for the State of Delaware

CHARLES M. OBERLY, III
Attorney General
DAVID G. CULLEY
Deputy Attorney General
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801
(302) 571-2500

LIST OF COUNSEL—Continued

Counsel for the State of Hawaii

WARREN PRICE, III
Attorney General
Department of the Attorney General
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for the State of Iowa

THOMAS J. MILLER
Attorney General
JOHN R. PERKINS
Deputy Attorney General
Hoover Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5164

Counsel for the State of Kansas

ROBERT T. STEPHAN
Attorney General
JOHN W. CAMPBELL
Deputy Attorney General
Chief, Litigation Division
MARK S. BRAUN
Assistant Attorney General
Antitrust Section
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

LIST OF COUNSEL—Continued

Counsel for the State of Kentucky

FREDERIC J. COWAN
Attorney General
JAMES M. RINGO
Assistant Attorney General
State Capitol Building
Frankfort, Kentucky 46601
(502) 564-4011

Counsel for the State of Louisiana

WILLIAM J. GUSTE, JR.
Attorney General
ANNE F. BENOIT
Assistant Attorney General
Chief, Antitrust Division
Louisiana Department of Justice
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112-2096
(504) 568-5575

Counsel for the State of Maryland

J. JOSEPH CURRAN, JR.
Attorney General
MICHAEL F. BROCKMEYER
Assistant Attorney General
Chief, Antitrust Division
ELLEN S. COOPER
Assistant Attorney General
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6470

LIST OF COUNSEL—Continued

Counsel for the State of Nebraska

ROBERT M. SPIRE
Attorney General
DALE A. COMER
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Counsel for the State of Texas

JIM MATTOX
Attorney General of Texas
MARY F. KELLER
First Assistant Attorney General
LOU McCREARY
Executive Assistant Attorney General
ALLENE D. EVANS
Assistant Attorney General
Chief, Antitrust Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2185

Counsel for the State of Wisconsin

DONALD J. HANAWAY
Attorney General
MARK E. MUSOLF
Deputy Attorney General
KEVIN J. O'CONNOR
Assistant Attorney General
MATTHEW J. FRANK
Assistant Attorney General
P. O. Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8986

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INTRODUCTION

The Amici States submit this brief in support of the Petitioner Federal Trade Commission. The decision of the District of Columbia Circuit in *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988), should be reversed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1] The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The states play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme

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[1] E.g., *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 1989 (CCH) Trade Cas. ¶ 68,575 (Tex. Civ. App. 1989).

[2] 15 U.S.C. § 15(c); *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (common law parens patriae); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972).

Court's prior decisions. Immunizing boycotts that are utilized to impose price-fixing agreements ("price-fixing boycotts") would allow anti-competitive conspiracies to continue unchecked.

Moreover, the attorneys general represent municipalities, counties, state agencies and other governmental entities whose purchases together account for 12% of the gross national product.[3] The attorneys general have a vital interest in maintaining the integrity of the process by which those transactions are accomplished. The novel exemption fashioned by the court of appeals would corrupt the process by which governments acquire goods and services and would virtually invite imposition of price-fixing boycotts against governments.

In addition, these local governments administer numerous programs similar to the District of Columbia's program for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court. Expanding the limits of First Amendment protection in the manner urged by the respondent Superior Court Trial Lawyers ("SCTLA") would create an enormous loophole in antitrust law that would inevitably impede states' efforts to preserve and foster competition.

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[3] U. S. Bureau of the Census, statistical Abstract of the United States 1989, at 421 (109th ed. 1988). In 1987, state and local government purchases amounted to 542.8 billion dollars. *Id.*

As the primary public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States support the Federal Trade Commission's contention that a price-fixing boycott directed at a government purchaser is a *per se* violation of the Sherman Act without regard to a demonstration of market power.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the "use of the *per se* rule without proof of market power is inappropriate as applied to a price-fixing boycott that served, in part, to make a statement on a matter of public debate." This Court's most recent pronouncement of the *Noerr* doctrine[4] in *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988), resolves the question whether a price-fixing boycott, such as that at issue here, is protected activity under the First Amendment and beyond the reach of the Sherman Act. Under *Allied Tube*,

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[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 123 (1961).

the SCTLA's price-fixing boycott at issue is not protected as "political activity" and is not protected as a "political boycott." It was unnecessary and redundant for the court of appeals to analyze the price-fixing boycott as "expressive conduct." The proper way to address the First Amendment concerns is with application of the *Noerr* doctrine and not by eroding the *per se* rule.

2. The court of appeals concluded that before a price-fixing boycott could be declared unlawful, proof of significant market power was required in order to demonstrate that the boycott succeeded because it was coercive rather than persuasive. The court of appeals' holding contravenes over eighty years of antitrust jurisprudence in which this Court has consistently held that horizontal combinations formed for the purpose and effect of tampering with the price of a commodity and service are unlawful *per se* under the Sherman Act. Such agreements are unlawful *per se* without any demonstration of market power. Requiring proof of market power to condemn a price-fixing boycott is unprecedented and creates formidable barriers to antitrust enforcement. Moreover, it replaces the efficiency and clarity of the *per se* rule with a novel market power test that promotes confusion.

3. The court of appeals' application of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The absence of market power does not justify a naked restriction on price or output.

Moreover, the purpose of inquiries into market power is to determine the actual or potential anticompetitive effects of an arrangement. Proof of actual anticompetitive effects obviates the need for inquiry into market power. The court of appeals rejected traditional demonstrations of market power and required proof of market power sufficient to demonstrate that the boycott succeeded because it was "coercive rather than persuasive." Such a requirement is unprecedented and is virtually impossible to apply. The court of appeals gave no useful guidance regarding what level of market power suffices to render unlawful a price-fixing boycott that is claimed to be "expressive conduct."

4. If the defense that price-fixing is being used to communicate a point of view can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. It will substantively weaken antitrust enforcement and will encourage price-fixing at least with respect to goods and services purchased by governments.

ARGUMENT

The court of appeals held that a concerted boycott by competing private practice attorneys in order to increase fees paid for their representation of indigent criminal defendants may be constitutionally protected activity. The court recognized that the SCTLA boycott could properly be condemned as a *per se* violation of the Sherman Act unless it came within the protection of the First

Amendment. *Superior Court Trial Lawyers Association*, 856 F.2d at 241.[5]

In reviewing possible sources of protection, the court rejected the claim that SCTLA's conduct was entitled to complete First Amendment immunity under the *Noerr* doctrine. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court also rejected SCTLA's contention that its conduct was a "political boycott" and thereby completely immune under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Id.* Though the court of appeals found the boycott was not immune from the antitrust laws under either *Noerr* or *Claiborne*, it concluded that the conduct could not be condemned without proof of market power. The court reached this conclusion by applying the test for evaluating "expressive conduct" articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). In applying the *O'Brien* test, the court concluded that use of the *per se* rule "without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers Association*, 856 F.2d at 250.

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[5] "Since no 'pro-competitive' justification, that is no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense . . . the boycott could properly be condemned as a *per se* violation of section 1 of the Sherman Act. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 241.

I. THE COURT OF APPEALS EVISCERATES THIS COURT'S DECISION IN *ALLIED TUBE*.

The Amici States assert that the court of appeals erred when it applied the *O'Brien* test after holding that SCTLA's horizontal price-fixing boycott was not immunized under *Noerr* or *Claiborne Hardware* pursuant to this Court's guidance in *Allied Tube*. *Allied Tube* is controlling precedent which resolves the First Amendment issues the court of appeals raised by applying the *O'Brien* test. The court of appeals' action has the effect of nullifying the precedential value of *Allied Tube* in governing the application of the Sherman Act to restraints of trade like the SCTLA boycott.

In the development of the *Noerr* doctrine, this Court has crafted a careful balance between the Sherman Act and the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988). There this Court recognized that the antitrust laws do not apply to concerted solicitation of anticompetitive government action unless the concerted solicitation itself amounts to a mere sham.

The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The Court held that an open public campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect. This Court refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms." 365 U.S. at 138. It reasoned that the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. This Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

In *Allied Tube*, however, this Court determined that even apart from any finding of mere sham, the *Noerr* doctrine does not immunize all petitioning conduct. This Court held that *Noerr* immunity does not protect the collective efforts of a private standards setting organization merely because the model codes agreed upon are subsequently adopted by governments. This Court established guidelines for determining whether collective conduct falls within the ambit of *Noerr*. There the Court said that "the scope of protection depends on the source context, and nature of the anticompetitive restraint at issue." *Allied Tube*, 108 S. Ct. at 1936.

In the instant case, the court of appeals acknowledged that "dicta in *Allied Tube* strongly suggest that *Noerr* does not extend to restraints indistinguishable from the one before us." *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals quoted the following passage from *Allied Tube*:

> We cannot agree with Petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied Tube, 108 S. Ct. at 1938-39 (parallel citations omitted). The court of appeals correctly determined that *Noerr* immunity was not available

to protect the SCTLA boycott from antitrust scrutiny. *Superior Court Trial Lawyers Association*, 856 F.2d at 247.

Moreover, respondents' boycott is not entitled to First Amendment protection as a "political boycott" under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). There, this Court held that a boycott of white retailers by black consumers in order to vindicate important constitutional rights was protected by the First Amendment from a claim that it violated state tort law. The "political boycott" doctrine articulated in *Claiborne Hardware*, however, does not encompass commercial boycotts by economic competitors who stand to reap economic benefit for themselves. Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the *Claiborne* Court said, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." *Id.*

In *Allied Tube*, this Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking economic benefits.

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of

> demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.

Allied Tube, 108 S. Ct. at 1941 (parallel citations omitted).

The court of appeals applied the *Claiborne Hardware* analysis to the SCTLA boycott and concluded that it was outside the protection of the First Amendment. The court noted that the First Amendment protection in *Claiborne Hardware* "rests on the findings that the boycott was not motivated by any desire to lessen competition or to reap economic benefits. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 245.

The cited passages from *Allied Tube*, although dicta, virtually dispose of the SCTLA boycott as if it were then before the Court. The SCTLA boycott is not "political activity" protected by the *Noerr* doctrine and is not a "political boycott" protected by *Claiborne Hardware*. The court of appeals concluded, however, that the absence of protection

under either *Noerr* or *Claiborne Hardware* did not conclusively resolve the claim that the SCTLA's boycot' is entitled to First Amendment protection.

Notwithstanding the court of appeals' recognition and application of *Allied Tube* in reviewing the SCTLA's boycott, the court determined further analysis was needed before the boycott could be condemned under the Sherman Act. The court's justification for further analysis was the presence of an element of expression contained in the boycott warranting First Amendment protection. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals turned to the test first enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the First Amendment protection of "expressive conduct." This four-part test was devised by this Court to determine whether a Vietnam War protestor's draft card burning was protected under the First Amendment. This Court held that a "regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government's interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than is essential to the furtherance of that interest." *Id.* at 377.

The court of appeals easily found that condemnation of the SCTLA boycott met the first three parts of the *O'Brien* test. *Superior Court Trial Lawyers Association*, 856 F.2d at 248. With

respect to the fourth requirement, however, -- that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the governmental interest -- the court of appeals concluded that a demonstration of market power was essential to evaluating the importance of the governmental interest at stake here.

It was error to use the *O'Brien* test after the court had already determined that under *Allied Tube* the price-fixing boycott was commercial activity primarily motivated by economic self-interest and thereby within the reach of the Sherman Act. In determining that the boycott was commercial activity and not political activity, the Court had already balanced the respective interests of society in our system of free enterprise with its unfettered marketplace against the First Amendment rights of speech and petition. The court of appeals recognized that it was in fact "[a]ccommodating the government's interest in regulating harmful economic activity to the right of citizens to engage in joint political action. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 246.

The *O'Brien* balancing of governmental rights against individual rights was subsumed in the court of appeals' *Allied Tube* analysis because *Noerr* and *Claiborne Hardware*, in essence, address in an economic setting petitioning the government and speech elements of a boycott as "expressive

conduct."[6] The court of appeals analyzed the SCTLA boycott under *Allied Tube*, balanced the competing interests, and concluded that the government's interest predominates, that is, the Sherman Act was applicable to declare the price-fixing boycott unlawful.

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[6] In *Claiborne*, this Court addressed the validity of economic regulation that "may have an incidental effect on rights of speech and association." *Claiborne Hardware*, 458 U.S. at 912. In *Claiborne*, this Court applied the *O'Brien* test to evaluate the validity of economic regulation that would have rendered the NAACP boycott unlawful, *Id.* at n.47. *Claiborne* analyzed the "petitioning" element of the NAACP boycott under *Noerr*. *Id.* at 913-14. ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action.") The speech element was evaluated under the *O'Brien* test. "The established elements of speech, assembly, association and petition, though not identical, are inseparable." *Id.*, at 911. The following passage from *Noerr* demonstrates that there, the court was in fact engaged in the same sort of analysis.

> The proscription of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. *Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities*, a caution which has been reflected in the decisions of this court interpreting such legislation.

Noerr, 365 U.S. at 141.

To balance these interests once again under *O'Brien* in the guise of "expressive conduct" was redundant. Embarking on the *O'Brien* test after having already determined that the boycott was within the reach of the Sherman Act was error. The court of appeals compounded its error when it reached inconsistent conclusions using the two approaches. The court of appeals in applying *O'Brien* lost sight of the fact that the *Allied Tube* analysis is by its nature limited to an inquiry into whether antitrust laws apply to particular conduct at all. In that sense, *Allied Tube* is a restatement of the *O'Brien* test appropriate to the commercial context of the antitrust laws. Neither *O'Brien* nor *Allied Tube* stand as a warrant for the court to have engaged in wholesale reordering of rules of law already found applicable.

II. THE COURT OF APPEALS' ABROGATION OF THE *PER SE* RULE OBSTRUCTS EFFECTIVE ANTITRUST ENFORCEMENT.

The court of appeals' application of the *O'Brien* case to the facts here is unprecedented. It determined that a naked price-fixing boycott that resulted in actual detrimental effects, could not, on that basis alone, be condemned. This determination was based upon the fact that overt acts in furtherance of the restraint of trade constituted "expressive conduct" which raised First Amendment considerations. The court of appeals concluded that before the restraint of trade could be declared unlawful, proof of significant market power -- which would conclusively demonstrate that the

boycott succeeded because it was "coercive rather than persuasive" -- was required. *Superior Court Trial Lawyers Association*, 856 F.2d at 253.

The court of appeals' holding contravenes over eighty years of precedent, in which this Court has constantly adhered to the principle that horizontal combinations formed for the purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity or service are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *See also United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). The court of appeals' determination also contravenes this Court's statement that even under rule of reason analysis, proof of market power is not necessary to determine the unreasonableness of a restraint of trade if actual anticompetitive effects are shown. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

To require proof of "market power" to condemn a naked price-fixing boycott creates a formidable obstacle to state and federal enforcement of the antitrust laws. The court of appeals' novel market power requirement would, if adopted, complicate, forestall, and possibly preclude condemnation of clearly anticompetitive conduct and weaken deterrence of undesirable economic behavior.

The court of appeals' subordination of the antitrust rights of the public to economic interests

of competing businessmen is inconsistent with previous statements of this Court regarding the importance of those antitrust rights. For example, this Court, in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Next, the court of appeals also reasoned that the *per se* rule could be abandoned here because it is not a statutory command, but merely a rule of administrative convenience. *Superior Court Trial Lawyers Association*, 856 F.2d at 249. The *per se* rule is more than an administrative convenience.[7]

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[7] Moreover, the court of appeals erred in concluding that the *per se* rule, even if viewed only as an administrative aid, should not be upheld under the *O'Brien* test. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court held that the general exclusion of a "bar letter" receipient from a military open house does not violate the First Amendment, stating that:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. (Citation omitted.) Instead, an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id., at 689.

This Court has recognized that the "*per se* rule" is a valid and useful tool for antitrust policy and enforcement to preserve this nation's economic freedoms.[8] *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1978). This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958) stated:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

See also 7 P. Areeda, *Antitrust Law*, ¶1509, at 408-414 (1986).

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[8] State antitrust law, either through case law or statute, expressly recognizes price-fixing agreements and other similar conduct as *per se* violations. *E.g.*, Conn. Gen. Stat. Sec. 35-28(a)-(d) (1989); *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1978); *Oakland-Alameda County Builders' Exchange v. Lathrop Const. Co.*, 4 Cal. 3d 354, 362-365, 93 Cal. Rptr. 602, 482 P.2d 226 (Cal. 1971); *Colorado v. Colorado Springs Board of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984).

If the defense of "expressive conduct" (i.e., that price-fixing is being used to communicate a point of view) can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. The result will burden litigation and, by holding out hope of exculpation, tempt more businessmen into naked trade restraints such as the price-fixing boycott at issue here. Thus, the "potential threat to the central nervous system of the economy," emasculation of the Sherman Act, and replacement of its philosophy with one which is "wholly alien to a system of free competition" apprehended and rejected by this Court in *Socony* will be revived.

In addition to prohibiting application of *per se* analysis, the court of appeals' use of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The court of appeals ignored this Court's statements in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984):

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

The court of appeals recognized that the SCTLA boycott was a naked restriction on price or output but still held that market power analysis was essential before the boycott could be declared unlawful. *Superior Court Trial Lawyers Association, passim.*

The court of appeals' decision elevates market power from a mere "surrogate" for anticompetitive effects to the very measure of the government's interest in prohibiting restraints of trade. This application of market power analysis is without precedent.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'
> 7 P. Areeda, Antitrust Law, ¶1511, p. 429 (1986).

FTC v. Indiana Federation of Dentists, 476 U.S. at 460-61.

The court of appeals accepted the Commission's findings of the SCTLA boycott's actual detrimental effects.[9] But, the court of appeals rejected the conclusion that such proven effects mandated a determination of unlawfulness. In addition, the court of appeals cautioned that even a finding of significant market power by the Commission on remand may not justify the condemnation of an "expressive" boycott. The court of appeals' imposed duty to weigh the value of alleged expressive conduct against the potential harm from such conduct, as measured by the participants' market power, obviously exceeds the proper role of any court.

The court of appeals' decision would replace the efficiency, clarity and certainty of the *per se* rule with a novel market power test that will promote confusion and attempted restraints of trade in the name of "expressive conduct." This decision is devoid of useful guidance to aid the Commission or the Amici States to determine what future expressive price-fixing boycotts and other types of *per se* restraints may remain unlawful.

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[9] The effects "dramatically reduced the supply of lawyers to the city's indigent defendant program; adversely affected the city's ability to meet constitutional obligations to provide counsel for indigent defendants; and forced the city government to increase CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [boycotters]." *See Superior Court Trial Lawyers Association*, 856 F.2d at 251.

The court's opinion, raises the possibility that society must tolerate anticompetitive activities if they can be successfully packaged as "expressive" boycotts.

The Amici States, therefore, respectfully request that this Court reject the court of appeals' market power requirement for horizontal price-fixing boycotts and other types of conduct that have been previously determined by this Court to be unlawful *per se*. The application of market power analysis to substantiate an otherwise naked restriction on competition whenever "expressive conduct" is present, emasculates the Sherman Act, removes the deterrent effect of the *per se* rule and restricts effective law enforcement. The proper balancing test is that expressed in *Allied Tube* concerning applicability of the *Noerr* doctrine and *Claiborne Hardware*.

III. CROSS-PETITIONERS' CLAIM THAT THEIR PRICE-FIXING BOYCOTT IS "POLITICAL ACTIVITY" BEYOND THE REACH OF THE ANTITRUST LAWS IS WITHOUT SUPPORT.

Respondents, through their cross-petition, attempt to shroud their naked price-fixing boycott from antitrust scrutiny by asserting that the boycott is protected under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as "political" activity. The Amici States are aware of no legal basis or case precedent to support respondents' claims. As presented earlier, *Allied Tube* resolves this issue.

Moreover, respondents' claimed motivation to advance the constitutional rights of indigent criminal defendants should not totally remove a price-fixing boycott from the scope of the antitrust laws. If so, antitrust enforcement will become dependent upon the creativity of the participants of a particular restraint of trade to invent political and social objectives for their anticompetitive actions. Businesses will use this "political activity protection" to apply coercive economic sanctions against governmental bodies to force regulatory changes concerning their businesses whenever they disagree with a governmental regulation or rule. It will also encourage predatory activities in the name of "political concerns." The court of appeals acknowledges as much in the following passage:

> [I]mmunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. . . . This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

Superior Court Trial Lawyers Association, 856 F.2d at 247.

The Amici States request that this Court reject respondents' argument. *Claiborne Hardware* does not permit the conclusion that a price-fixing

boycott or other restraints of trade are "political" activity protected under the First and Fourteenth Amendments whenever political and social objectives may be advanced. Indeed, this Court previously rejected this exact argument. In *Allied Tube*, this Court determined that restraints of trade are not protected under *Claiborne Hardware* where the participants were "at least partially motivated by the desire to lessen competition, and . . . stood to reap economic benefits. . . .," 108 S. Ct. at 1941.

Limiting *Claiborne Hardware* to situations where there is an absence of anticompetitive intent strikes a proper balance between First Amendment rights and government's legitimate and substantial interests in protecting competition. Reaffirming *Allied Tube* will continue to provide protection from the antitrust laws for true political activity such as occurred in *Claiborne Hardware* and *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). Price-fixing boycotts or other restraints of trade with political attributes such as occurred in *Allied Tube* and this case, however, will continue to be subject to the full force and effect of the federal and state antitrust laws.[10]

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[10] Respondents in their cross-petition have not challenged the FTC's factual determination that respondents' boycott was designed to restrain competition for the direct economic benefit of its members. Also, the court of appeals' opinion specifically affirmed the FTC's finding that the boycott was motivated primarily by "economic self-interest." *Superior Court Trial Lawyers Association*, 856 F.2d at 246. These facts preclude a determination that respondents' boycott was "political" activity entitled to First Amendment protections.

Price-fixing boycotts and other restraints of trade performed with anticompetitive intent cannot be condoned as part of the "political" process.

CONCLUSION

The District of Columbia Circuit's opinion should be reversed.

DATED June 22, 1989
Phoenix, Arizona

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona
ALISON J. BUTTERFIELD
Chief Counsel
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4551

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

By: Robert K. Corbin

ROBERT K. CORBIN
Counsel of Record

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

(7) (6)

Nos. 88-1198 and 88-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Cross-Petitioners,
v.
FEDERAL TRADE COMMISSION,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

Of Counsel:
KIRK B. JOHNSON
EDWARD B. HIRSHFELD
MICHAEL L. ILE
AMERICAN MEDICAL ASSOCIATION
535 N. Dearborn Street
Chicago, Illinois 60610
(312) 645-4600

JACK R. BIERIG*
RICHARD D. RASKIN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Attorneys for Amicus Curiae American Medical Association

* Counsel of Record

July 28, 1989

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QUESTIONS PRESENTED

1. Whether the First Amendment protects the right of a professional association and its members to engage in an expressive boycott designed to publicize and enlist political support for a legislative increase in the rate of reimbursement for members' services.

2. Whether an expressive boycott may be condemned under the antitrust laws without proof that the participants had market power, *i.e.*, that they had the capacity to cause any actual harm to competition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION,

Petitioner,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,

Respondents.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,

Cross-Petitioners,

v.

FEDERAL TRADE COMMISSION,

Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

The American Medical Association respectfully submits this brief as *amicus curiae* in support of the Superior Court Trial Lawyers Association, *et al*. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 36.2.

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its membership exceeds 280,000 physicians and medical students.

The AMA is dedicated to promoting the public welfare through the maintenance of appropriate professional standards and the provision of quality health care. To this end, the AMA and its members participate in a wide range of educational, informational, and certification programs. The AMA also advocates policy positions on public issues that affect the quality and availability of medical care. In particular, the AMA regularly takes positions upon proposed legislation that would affect the care provided under government-supported medical benefits programs such as Medicare and Medicaid.

In this case, the Federal Trade Commission ("FTC" or "Commission") has challenged the activities of the Superior Court Trial Lawyers Association ("SCTLA"), a professional association of lawyers who represent criminally accused indigents in the District of Columbia courts. The SCTLA organized a collective refusal to accept new case appointments under the District's Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.), for the purpose of obtaining public and political support for a legislative increase in the hourly reimbursement rates paid to its members. The Commission has taken the position that the SCTLA's activities are entitled to no First Amendment protection and are properly condemned as a *per se* violation of the antitrust laws.

The AMA recognizes that preservation of this nation's trade freedom depends upon vigorous enforcement of the antitrust laws. It does not advocate strikes or boycotts by competitors collectively exercising market power. However, the AMA believes that the Commission's approach to this case shows insufficient regard for the First Amendment rights of professional associations and their members. The AMA's interest in this case is to support the right of professional associations to use effective means to express their views to the government, including their views on appropriate levels of reimbursement.

In the AMA's view, the court of appeals in this case struck an appropriate balance between the vital interest in unfettered competition and the "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The AMA therefore files this brief as *amicus curiae* to urge the Court to affirm the ruling of the court of appeals.[1]

STATEMENT

1. This case involves a boycott by a professional association of lawyers aimed at influencing District of Columbia officials to increase reimbursement rates for lawyers who represent indigent defendants in criminal cases. The boycott—or "strike" as it was referred to by the participants and the media —was organized by the SCTLA, a professional association of lawyers who accept case assignments under the District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 through 11-2609 (1981 and 1988 Supp.) ("the CJA"). The boycott was part of a larger, ultimately successful, political and publicity campaign to persuade the District of Columbia legislature that the CJA reimbursement rates were inadequate.

At the time of the boycott in 1983, fees for CJA cases had not been increased since 1970. The fees were set at $20 an hour for out-of-court time and $30 an hour for in-court time, with a per case maximum of $400 for misdemeanors, $1000 for felonies, and $1000 for appeals. Even at the time these rates were established in 1970, they were viewed as low. S. Rep. No. 790, 91st Cong., 2d Sess. 14-15 (1970). Justice Powell referred to the rates as "low

[1]This brief addresses the issues raised in the Commission's petition for certiorari, Case No. 88-1198. The AMA does not address the extent to which particular forms of political activity are entitled to categorical immunity from the antitrust laws under this Court's decisions in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), or the *Noerr - Pennington* line of cases. *See United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

by American standards" and noted that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger* v. *Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). From the mid-1970s until the time of the boycott, a number of bar associations and judicial groups issued reports commenting upon the inadequacy of the rates and urging a legislative increase to ensure adequate representation for the indigent accused. 856 F.2d at 229; 107 F.T.C. at 534.[2]

In the summer of 1982, the SCTLA leadership began a lobbying campaign to increase the CJA compensation rates. *Id.* Their efforts included meetings with the Mayor of the District of Columbia, the Chief Judge of the Superior Court, and other District of Columbia officials. *Id.* at 535-537. Several of these officials stated privately that they believed an increase was warranted, but indicated that the lawyers "would have to generate the political support for it." *Id.* at 535.

In March 1983, D.C. Council Chairman Clarke introduced Bill No. 5-128 to raise the CJA rates to $35 per hour for both in-court and out-of-court time. Although SCTLA members lobbied on behalf of the bill, it soon became apparent that the bill lacked the support necessary for enactment. Support grew among the SCTLA members for dramatic action to publicize and gain political support for their campaign. At an SCTLA meeting of August 11, 1983, the lawyers voted to "strike"—*i.e.*, to continue to represent clients on existing matters, but to stop accepting new CJA appointments as of September 6 if no legislative action was taken by that date. 107 F.T.C. at 539.

The strike began as planned on September 6, 1983 and lasted for about two weeks. During that period, the SCTLA scheduled

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[2]The following citation forms are used in this brief: "856 F.2d" refers to the court of appeals opinion; "107 F.T.C." refers to the opinions of the administrative law judge and the Commission; "J.A." refers to the joint appendix filed in this Court; and "FTC Br." refers to the Commission's brief before this Court.

a series of events—rallies, picket lines, handouts of press kits, and newspaper and television interviews—designed to educate the public about the inadequacy of CJA reimbursement rates. *Id.* at 543. The strike enabled SCTLA to obtain widespread media coverage of the reimbursement issue. (*E.g.*, J.A. 900, 921-22, 934, 946, 954).

On September 16, 1983, ten days after the strike began, the Mayor wrote to Council member Rolark expressing his willingness to support Bill No. 5-128. The same day, Rolark and Council Chairman Clarke met with the SCTLA lawyers and advised them that they would support the bill. Chairman Clarke presented the bill as a "take it or leave it proposition," and indicated that nothing would be passed if the lawyers rejected it. 107 F.T.C. at 548. Three days later, the SCTLA voted to accept the $35 per hour rate. The D.C. Council then passed Bill No. 5-128 and the Mayor —stating that "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District"—signed the bill. (J.A. 961). On September 21, 1983, the SCTLA lawyers resumed accepting new appointments under the CJA. 107 F.T.C. at 548-49.

2. On December 16, 1983, the Commission filed a complaint against the SCTLA and four of its individual members alleging that the concerted refusal to accept new case appointments was an unfair method of competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45.[3] Following a three-week hearing, an administrative law judge ("ALJ") dismissed the complaint. The ALJ concluded that, rather than being anticompetitive, the strike merely made it politically possible for District officials to imple-

[3]The Commission throughout the proceedings below relied on standards derived from this Court's cases interpreting § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, the AMA will discuss the issues in this case in terms of the Sherman Act.

ment an increase in reimbursement rates that everyone agreed were "woefully inadequate." 107 F.T.C. at 509.

On appeal from the ALJ's decision, the Commission held that the SCTLA boycott was a *per se* violation of the antitrust laws. The Commission rejected the SCTLA's argument that the political dimensions of the boycott made *per se* treatment inappropriate. In the Commission's estimation, the strike was indistinguishable from those naked restraints on price and output that have been condemned under the antitrust laws without examination of their actual competitive effects. *Id.* at 575.

Alternatively, the Commission held that the SCTLA strike failed a rule of reason test. In reaching this conclusion, however, the Commission did not (1) define a relevant market, (2) determine the lawyers' market share, or (3) make any specific findings regarding market power. 856 F.2d at 250. Notwithstanding the absence of such findings, the Commission concluded that the boycott had harmed competition, and that "a direct causal link" existed between the boycott and the D.C. Council's decision to increase fees. 107 F.T.C. at 578.

3. The court of appeals reversed and vacated the Commission's order and remanded for additional proceedings to determine whether the boycott participants had market power. The court found that, while the SCTLA's conduct was not entirely exempt from the antitrust laws, it "did contain an element of expression warranting First Amendment protection." 856 F.2d at 248. The court therefore applied the test for analyzing expressive conduct set forth by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968).

Under that test, the court found, the Commission's application of a *per se* rule violated the requirement that any incidental limitation on First Amendment freedoms be "no greater than is essential" to the furtherance of a substantial government interest.

Although the court did not question that the government has a substantial interest in preventing unreasonable restraints of trade, it held that the Commission's *per se* approach swept more broadly than necessary to effectuate that interest. Further, the court held that an inquiry into market power was necessary to determine whether the increased rates were in fact the product of economic coercion rather than a successful political lobbying campaign. 856 F.2d at 251-52.

The court directed the Commission, on remand, to define a relevant market, to estimate the boycott participants' share of that market, and to assess the significance of that market share in light of other factors relevant to the exercise of market power. It further instructed the Commission to determine, if market power is present, "how much market power is sufficient to justify the condemnation of an expressive boycott." *Id.* at 252. "Clearly," the court concluded, "the First Amendment concerns implicated by expressive boycotts require that they not be condemned if their ability to harm competition is insignificant." *Id.* at 252-53.

SUMMARY OF ARGUMENT

In its decision below, the Commission attached no significance to the communicative purposes of the SCTLA boycott or the political context in which it occurred. It therefore perceived no necessity to tailor its analysis to avoid condemning competitively harmless expressive activity. The Commission treated this case precisely as it would a "naked price fixing boycott." FTC Br. at (i).

The First Amendment requires a more discriminating analysis, however. If examination of the entire "factual context and environment" of the case indicates that the challenged conduct is expressive, then the conduct must be evaluated under the applicable First Amendment standard of review. *Spence* v. *Wash-*

ington, 418 U.S. 405, 409-10 (1974).[4] Specifically, if the conduct is speech-related, then any governmental regulation of the conduct must be narrowly tailored to further a substantial government interest. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). It is therefore essential, at the outset, to determine whether the SCTLA boycott is an activity protected by the First Amendment.

1. For at least three reasons, the SCTLA's activities are entitled to First Amendment protection. First, the boycott involved a matter of critical public importance: the appropriate level of reimbursement for professionals offering publicly-supported legal services for the poor. The SCTLA's activities were intended to communicate the boycott participants' opinions regarding this issue and were reasonably understood as doing so by the media and general public. Such communication regarding matters of public concern implicates core First Amendment values.

Second, the boycott was essential for the SCTLA lawyers to express their views in an effective manner. Although boycotts can pose a threat of harm to competition, they are also a recognized form of group advocacy. A balancing test provides an appropriate method of accommodating the expressive value of certain boycotts, without insulating from antitrust scrutiny conduct that is demonstrably harmful to competition.

Third, the boycott represented a genuine attempt to influence governmental action. As this Court recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a representative form of government depends upon the free flow of information between the citizenry and its repre-

[4] *Spence* held that displaying the American flag with a peace symbol affixed "at a time of national turmoil over the introduction of United States forces into Cambodia and the deaths at Kent State University" was expressive. 418 U.S. at 414 n.10; *see also Texas* v. *Johnson*, 57 U.S.L.W. 4770 (June 21, 1989) (burning flag as part of demonstration outside Republican National Convention held expressive); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming *arguendo* that sleeping in public park to dramatize plight of homeless was expressive).

sentatives. That the views communicated by the SCTLA boycott are consistent with the economic self-interest of the lawyers does not diminish, and in fact may enhance, the boycott's informational value. Even assuming that the boycott is not entirely exempt from antitrust liability under *Noerr*, the interests identified in that decision support an intermediate form of First Amendment protection for genuine petitioning activity.

2. Summary condemnation of the SCTLA boycott is inappropriate both as a matter of antitrust law and of constitutional law. According to basic antitrust principles, *per se* treatment is reserved for conduct that is manifestly anticompetitive. An expressive boycott, rather than being a "naked" restraint of trade, has the potential to enhance competition by improving the ability of a purchaser—in this case the District—to define and implement its purchasing objectives. Indeed, the SCTLA boycott may have performed the procompetitive function of informing District policymakers that they were purchasing a lesser amount or quality of CJA legal services than the public desired.

But even if the boycott were otherwise illegal *per se*, its First Amendment implications would require the Commission to measure the lawyers' market power before pronouncing their conduct unlawful. Because their conduct was expressive, any restrictions on the lawyers' activities must be "no greater than is essential" to the furtherance of a substantial governmental interest. *O'Brien*, *supra*, 391 U.S. at 377. Although the government has an important interest in preserving competition, that interest is not even called into play unless the boycott had a clearly demonstrated ability to harm competition—*i.e.*, unless the participants had market power. *Per se* rules may serve a secondary interest in administrative convenience, but that interest is not sufficient to justify the suppression of expressive activity that may not substantially harm competition. Stated another way, the overinclusiveness of the *per se* rule—its condemnation of some

procompetitive or competitively neutral arrangements—cannot be tolerated as applied to activities protected by the First Amendment.

The Commission's argument that a legislative increase in reimbursement rates constitutes sufficient evidence of competitive harm is also unavailing. As the court of appeals explained, in the context of an expressive boycott, it cannot readily be determined whether political or economic power is the cause in fact of a favorable governmental action. An inquiry into market power is necessary to determine, as a preliminary matter, whether the boycott participants *could have* restrained trade. To the extent that the increase enacted by the D.C. Council was the result of political factors rather than the exercise of market power, the SCTLA boycott should not be actionable under the antitrust laws.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF A PROFESSIONAL ASSOCIATION AND ITS MEMBERS TO ENGAGE IN AN EXPRESSIVE BOYCOTT DESIGNED TO PUBLICIZE AND ENLIST POLITICAL SUPPORT FOR A LEGISLATIVE INCREASE IN THE RATE OF REIMBURSEMENT FOR MEMBERS' SERVICES.

Whether particular conduct implicates the First Amendment depends upon "the nature of the . . . activity, combined with the factual context and environment in which it was undertaken." *Spence* v. *Washington*, 418 U.S. 405, 409-10 (1974). Examination of the entire record in this case indicates that the SCTLA's activities were "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment. *Id.* at 409; *Texas* v. *Johnson*, 57 U.S.L.W. 4770, 4772 (June 21, 1989). Three separate elements of the SCTLA's conduct warrant First Amendment protection: (1) the SCTLA's activities involved a matter of public importance; (2) collective action by the SCTLA lawyers

was essential to effective advocacy; and (3) the SCTLA's activities represented a genuine attempt to influence governmental action.

A. The SCTLA's Activities Involved a Matter of Public Importance.

The SCTLA's activities conveyed the lawyers' viewpoint regarding the appropriate level of reimbursement for lawyers who defend the indigent criminally accused. (J.A. 184). In the District of Columbia as in states and municipalities around the nation, the extent of the governmental commitment to fund basic services for the poor is a public issue of profound importance. Benefits programs involving legal services, health care, and housing are regularly the subject of debate in the pages of newspapers and magazines and the halls of state legislatures and Congress. Far more than the income of providers is at stake in these debates: The level of reimbursement affects both the availability and the quality of basic services for the poor. These debates therefore implicate fundamental national values.

Because debate on public issues "has always rested on the highest rung of the hierarchy of First Amendment values," *Carey* v. *Brown*, 447 U.S. 455, 467 (1980), this Court has taken particular care to ensure that conduct occurring in the context of a political conflict be regulated only to the extent necessary to further a substantial government interest. In *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982), for example, the Court held that the State of Mississippi could not impose tort liability for the non-violent elements of a boycott organized by the NAACP and directed at local white merchants. A critical consideration in the Court's analysis was that the boycott was designed to dramatize the protestors' concern with racial prejudice, a matter of unquestioned public importance. *Id.* at 912; *see also Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940) (picketing to publicize views on "matters of public concern" held protected).

The plight of the SCTLA lawyers and their clients is clearly an important public issue. (J.A. 326-27, 389-90). Without adequate reimbursement, the SCTLA lawyers could be forced to cease providing representation for the poor. In particular, those SCTLA lawyers with the most skills and experience would face strong incentives to abandon their CJA practices and shift their attention to more lucrative areas of law. (J.A. 765). Other SCTLA lawyers might leave the practice of law entirely. As a consequence, the indigent accused in the District of Columbia could have difficulty securing adequate representation.

Moreover, the record demonstrates that the SCTLA's activities were both genuinely intended to draw public attention to these issues and reasonably understood as communicating the message. *Spence*, *supra*, 418 U.S. at 410-11; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. The SCTLA lawyers had been advised by public officials that, to obtain a legislative increase, they "would have to generate the political support." 107 F.T.C. at 535. They responded by organizing the refusal to accept new appointments as a dramatic means of calling public attention to the issue. By distributing leaflets and organizing rallies and picket lines, they actively solicited, and ultimately obtained, widespread media coverage. (J.A. 914-54). That the media and general public responded to the protestors' efforts confirms both that the boycott served "to make a statement on a matter of public debate," 856 F.2d at 250, and that it was perceived as doing so by the protestors' intended audience.[5]

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[5]Had the protest not involved an issue of public concern—if nothing more than the economic interests of the protestors had been at stake—presumably neither the media nor the public would have responded. *Cf. Mount Healthy City School Dist. Board of Education* v. *Doyle*, 429 U.S. 274 (1977) (radio coverage of controversy suggests that public issue is involved and that First Amendment standards apply). They surely would not have responded as they did, with widespread declarations of support and sympathy for the protestors.

B. Collective Action by the SCTLA Lawyers Was Essential to Effective Advocacy.

The SCTLA lawyers joined together for the purpose of expressing their views in a dramatic and forceful manner that no one of them could achieve individually. Yet it is precisely because the lawyers acted collectively that their conduct is being challenged as an antitrust violation. *See* 107 F.T.C. at 577. In analogous circumstances, this Court has consistently held that enforcement actions directed at group advocacy must be closely scrutinized to ensure that the participants' right to band together to "make their views heard on public issues" is not unnecessarily infringed. *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295 (1981).

Group association is protected "because it enhances 'effective advocacy.'" *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). As the Court explained in *Citizens Against Rent Control, supra*, "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." 454 U.S. at 294. The right of association enables individuals with shared interests to pool their resources to assert their views "as effectively and economically as practicable." *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 580 (1971); *see Meyer* v. *Grant*, 108 S. Ct. 1886, 1893 (1988).

Boycotts in particular have been recognized as "a staple of political, as well as economic, activity." *Costello Publishing Co.* v. *Rozelle* , 670 F.2d 1035, 1050 (D.C. Cir. 1981). As the court of appeals observed, boycotts "have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." 856 F.2d at 248. To be sure, a boycott—in addition to enhancing the effectiveness of advocacy—may increase the threat of harm to competition. But that fact goes to the *weight* of the government's interest in forbidding the boycott and is not a reason for foregoing any and all First Amendment balancing. *See, e.g.*, *United States* v. *National*

Society of Professional Engineers, 555 F.2d 978, 984 (D.C. Cir. 1977) (striking down portion of antitrust decree on First Amendment grounds, because "more intrusive than necessary to achieve fulfillment of the governmental interest" in preventing future violations), *aff'd on other grounds*, 435 U.S. 679 (1978).

In this case, collective action was the only effective means available for the SCTLA's members to mobilize political support for a fee increase. By acting through their association, the lawyers were able to conserve financial resources while maximizing their ability to draw public and media attention to the reimbursement issue. Indeed, disinterested observers suggested to the SCTLA's leadership that collective action was the lawyers' only hope for obtaining a political result. 107 F.T.C. at 536. Moreover, by taking the concededly drastic step of withdrawing their services from the program, the lawyers were able to bring the issue to the attention of policymakers who had previously disregarded it. Because the SCTLA lawyers faced strong political, as well as economic, incentives to engage in the boycott, their "strike" is entitled to the same measure of protection generally accorded to group efforts to persuade.

C. The SCTLA's Activities Represented A Genuine Attempt to Influence Governmental Action.

The extent to which political versus commercial motivations propelled the boycott is a matter of vigorous dispute between the parties. *See* 107 F.T.C. at 586-88. Regardless of the underlying motivations, however, there can be no serious question that the one indispensable goal of the boycott was to secure the passage of legislation increasing the CJA reimbursement rate.[6] Because the boycott represented a genuine attempt to influence govern-

[6]*See* 856 F.2d at 242. Because the District's CJA rates are set by statute, the strikers simply "could not gain economically in the absence of favorable legislation." Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 116 (1985) [hereinafter "*Abuse of Governmental Processes*"] (citing this factor as one reason for affording First Amendment protection).

mental action, the First Amendment mandates that the antitrust laws be applied—if at all—with extreme caution.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a group of trucking companies sued a group of railroad companies and their public relations firm alleging that they had conspired to restrain trade in the business of long-distance freight hauling. The truckers maintained that the railroad companies had engaged the public relations firm to conduct a publicity campaign designed to "foster the adoption . . . of laws . . . destructive of the trucking business" and "create an atmosphere of distaste for the truckers among the general public." *Id.* at 129. The Court held that the Sherman Act did not prohibit this conduct, regardless of its anticompetitive purposes or effects. In so holding, the Court emphatically rejected the contention that the railroads' economic interest in conducting the campaign affected the scope of their petitioning rights:

> It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139; *see also United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

Noerr suggests that the SCTLA's activities may be entirely exempt from antitrust prosecution. Like the railroads in *Noerr*, the SCTLA's members joined together for the express purpose of

securing legislation. Moreover, like the railroads, the SCTLA did not confine itself to simple lobbying, but engaged in a broader effort to publicize its views and persuade the public to support them. The mere fact that the legislation would be economically advantageous to the members of the SCTLA does not preclude constitutional protection for their conduct. On the contrary, *Noerr* recognizes that economic self-interest may provide a powerful incentive for like-minded persons to gather and disseminate the essential "information upon which governments must act."

Noerr, however, does not directly address the situation presented in this case. As the Commission noted in its opinion, "[i]n the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the marketplace. . . . Here, the government is itself a player in the relevant line of commerce. . . ." 107 F.T.C. at 596. Because the District government was acting as a purchaser as well as a policymaker, the possibility exists that the SCTLA boycott could have resulted in *direct* harm to competition, even apart from the District's ultimate decision to enact legislation increasing reimbursement rates.[7] In these circumstances, a categorical exemption from the antitrust laws may not be appropriate. *See* 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 206 (1978).

This conclusion, however, does not imply that the governmental identity of the D.C. Council is, as the Commission concludes, irrelevant. 107 F.T.C. at 596. At a minimum, *Noerr* requires that the government's interest in pursuing an antitrust action against genuine efforts to influence a governmental purchasing decision, and the government's means of furthering that interest, be closely

[7]As explained in part II, *infra*, it cannot be determined whether the SCTLA's activities resulted in any harm to competition prior to assessing the market power of the boycott participants.

scrutinized to insure against unnecessary encroachments of First Amendment freedoms.[8]

* * * *

In short, the SCTLA's activities were "sufficiently imbued with elements of communication" to fall within the scope of the First Amendment. *Spence*, *supra*, 418 U.S. at 409; *Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4772. Viewed in context, the boycott was designed not merely to benefit the participants, but to galvanize public support for an important policy initiative. Expression of this nature, whether in the form of speech or conduct, is at the heart of the First Amendment's protection.

Plainly a civil action enjoining this conduct constitutes a direct and significant infringement of the SCTLA's First Amendment rights. Accordingly, the Court must determine whether, as the Commission concludes, an expressive boycott may be suppressed without regard for its actual competitive consequences.

II. THE MARKET POWER OF THE PARTICIPANTS IN AN EXPRESSIVE BOYCOTT MUST BE ASSESSED TO AVOID PENALIZING PROTECTED CONDUCT THAT MAY NOT BE HARMFUL TO COMPETITION.

The court of appeals showed enormous deference to the policies of the antitrust laws and the powers of antitrust enforcers. Despite having found that the SCTLA boycott "served, in part, to make a statement on a matter of public debate," 856 F.2d at 250, the court held that the boycott could be prohibited if its demonstrated economic effect was to suppress competition. The

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[8]This is particularly true where, as here, the government's purchasing decision involves a significant policy determination. *Cf. George Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). Unlike, for example, the purchase of office supplies or "a technical decision about the best kind of weld to use in a swimming pool gutter," *id.*, the setting of CJA reimbursement rates involves fundamental questions of public policy. *See* pp. 11-12, *supra*.

court merely required the Commission to prove, rather than to presume, competitive harm. *Id.* That accommodation of the relevant interests was clearly appropriate, both as a matter of antitrust and First Amendment principles.

1. Under ordinary antitrust principles, the SCTLA's activities should be examined under the rule of reason rather than a *per se* rule. *Per se* rules are to be invoked only "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents of the University of Oklahoma,* 468 U.S. 85, 103-04 (1984). "Only when there is very little loss to society from banning a restraint altogether is an inquiry into its costs in the individual case considered to be unnecessary." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde,* 466 U.S. 2, 33-34 (1984) (O'Connor, J., concurring).

The Commission had no basis in the record to conclude with confidence that the SCTLA's conduct was inherently anticompetitive. Just as the communicative elements of the boycott entitle the SCTLA lawyers to the protections of the First Amendment, so does the informational value of their message raise the prospect of procompetitive benefits. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976). In this respect, constitutional and antitrust law are in complete agreement.

Like private purchasers of a service, governments require information in order to establish a price that permits them to obtain the mix of service characteristics (primarily price, supply, and quality) that they desire. Setting the price at too high a level causes waste of economic resources; setting it too low may reduce the amount and quality of services provided. Information from suppliers may enable the purchaser to attain the optimal balance.

To be sure, the information that a purchaser needs to receive from its suppliers can generally be conveyed through means less

drastic than a boycott. But for governments, and perhaps some private purchasers as well, evidence of public reaction to the consequences of alternative pricing strategies may itself be essential information to consider in setting a price. As representatives of the people, governmental officials necessarily shape their purchasing objectives upon information concerning what their constituents want. A dramatic appeal for public and media attention may provide significant information regarding the public's desires. Thus, the SCTLA boycott may have performed the procompetitive function of apprising District officials that—contrary to their apparent assumption—the citizenry of the District supported, or at least did not oppose, a rate increase.[9]

By generating information regarding both the problems caused by underfunding of the CJA program and the public's response to those problems, the SCTLA boycott may have enabled the District to make needed adjustments in its price and purchasing requirements—to the benefit not only of the SCTLA lawyers and their clients, but the general public as well. In any event, the informational value of the SCTLA's activities raises a sufficient prospect of procompetitive benefits to render *per se* treatment inappropriate.[10]

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[9]Respondent Perrotta's testimony before the administrative law judge illustrates the point:

> [F]or all that the Mayor knew in advance, the [public] reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city. The reaction might have been the crime rate is already so enormous. . . . There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense. . . . [W]e never got an unkind word from anybody after the strike.

(J.A. 186-87).

[9]*See Osborn* v. *Pennsylvania-Delaware Service Station Dealers Ass'n*, 499 F. Supp. 553, 558 (D. Del. 1980) (applying rule of reason because

(Footnote continued on following page)

2. Even if antitrust principles considered in isolation supported application of a *per se* rule, the First Amendment implications of the SCTLA boycott would preclude a summary approach. In this regard, the logic of the court of appeals' analysis is unquestionably correct.

Once it is determined that particular conduct is entitled to First Amendment protection, *O'Brien* requires that any restrictions on the conduct be "no greater than is essential" to the furtherance of a substantial government interest. *O'Brien,* 391 U.S. at 377. The substantiality of the governmental interest in preserving freedom of competition cannot seriously be questioned. This Court has observed that the antitrust laws are "as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 110-11 (1980) (citing *United States* v. *Topco Assocs., Inc.,* 405 U.S. 596, 610 (1972)). Thus, under the *O'Brien* test, an expressive boycott proven to result in significant competitive harm could be prohibited, notwithstanding its communicative value.

As the court of appeals explained, however, determining whether expressive conduct has any actual capacity to harm com-

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(Footnote continued from previous page)
expressive boycotts "are likely to follow other patterns and have other effects than more conventional forms of joint refusals to deal").

The court of appeals appeared to assume that, absent some degree of economic integration among the boycott participants, the boycott must be viewed as a "naked" restraint. 856 F.2d at 236. But courts have often recognized that horizontal competitors may combine to produce information that enhances the ability of the market to function in an efficient manner—even though (1) the information-producing activity can be characterized in some sense as a "boycott," and (2) the competitors have *not* integrated their economic operations. *See, e.g., Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute,* 851 F.2d 478 (1st Cir. 1988), *cert. denied,* 109 S. Ct. 789 (1989); *Consolidated Metal Products, Inc.* v. *American Petroleum Institute,* 846 F.2d 284 (5th Cir. 1988).

petition requires an inquiry into market power.[11] Without such an inquiry, it is impossible to know whether the governmental interest in preserving free trade is even implicated.[12] Although application of a *per se* rule may serve a secondary governmental interest in administrative convenience, that interest does not justify the suppression of expressive activity with indeterminate competitive effects. Accordingly, the Commission's failure to measure the market power of the boycott participants violates *O'Brien*'s admonition against restrictions that are not supported by a substantial governmental interest.

Viewed from a slightly different perspective, the Commission's *per se* approach runs afoul of a separate branch of the *O'Brien* test: the requirement that regulations of expressive conduct be narrowly tailored to the relevant governmental interest.[13] As this Court has explained, a regulation

> is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. *Schultz*, 108 S. Ct. 2495, 2502-03 (1988) (citations omitted). An expressive boycott with predominantly procompetitive or competitively neutral effects is not "an appropriately targeted evil." *Id.* Because the Commission's approach would indiscriminately sweep such activity within the same proscription as conduct that is demonstrably anticompetitive, it fails to provide the

[11] 856 F.2d at 249; *see also Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (market power "is a prerequisite to being able to restrain trade unreasonably").

[12] *Cf. Texas* v. *Johnson*, *supra*, 57 U.S.L.W. at 4773 (government interest in preventing breach of peace not implicated by public flag burning as part of political protest, where record showed no actual threat of disturbance occurring).

[13] This Court has stated that *O'Brien*'s "no greater than is essential" formulation is equivalent to a "narrowly tailored" standard. *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5018 & n.3 (June 27, 1989); *see also Community for Creative Non-Violence*, *supra*, 468 U.S. at 298.

"precision of regulation" that the First Amendment commands. *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

a. The Commission's brief argues, apparently for the first time, that the *O'Brien* test is not applicable because *Claiborne* and *Noerr* exhaust the First Amendment's concern for expressive conduct that may adversely affect competition. FTC Br. at 25-28. But nothing in either *Claiborne* or *Noerr* precludes an intermediate level of scrutiny for conduct that does not fall within the specific parameters of the exemptions set forth in those decisions. Indeed, *Claiborne* recognized the applicability of the *O'Brien* test to expressive boycotts, 458 U.S. at 912 & n.47, as have other courts and commentators that have considered the issue.[14]

Rather than constituting a "novel and untenable exception," FTC Br. at 11, a requirement that competitive harm be demonstrated by exacting proof represents a logical application of established First Amendment principles. In diverse areas of substantive law, this Court has held that the First Amendment may require heightened proof of the elements of a legal violation before expression may be penalized. In *Claiborne,* for example, the Court held that the presence of expressive conduct "imposes restraints on the grounds that may give rise to [tort] damages liability and on the persons who may be held accountable for those damages." 458 U.S. at 916-17; *see also Roaden* v. *Kentucky,* 413 U.S. 496, 504 (1973) (seizures of allegedly obscene books or films must meet higher standard of Fourth Amendment reasonableness than seizures of non-expressive contraband); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) (heightened evidentiary showing required in libel actions involving public officials). Similarly, when a court in an antitrust case is faced with ambiguous evi-

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[14]*See, e.g., Osborn, supra,* 499 F. Supp. at 557; Note, *A Market Power Test for Noncommercial Boycotts,* 93 Yale L.J. 523, 532 & n.52 (1984) [hereinafter *"A Market Power Test"*]; Comment, *Protest Boycotts Under the Sherman Act,* 128 U. Pa. L. Rev. 1131, 1144 (1980); Note, *Political Boycott Activity and the First Amendment,* 91 Harv. L. Rev. 659, 671 (1978) [hereinafter *"Political Boycott Activity"*].

dence of conspiracy, the First Amendment may require a clearer showing of actual agreement than would otherwise be required.[15]

In each of these situations, heightened evidentiary burdens serve the function of guarding against insufficiently justified infringements of expressive rights. The market power requirement, as articulated by the court of appeals, does this and nothing more.

b. The Commission contends that a market power requirement would significantly impair its enforcement program. But as the Commission itself notes, expressive boycotts have been "infrequent." FTC Br. at 33. In light of the paucity of cases, the Commission's protestation that a market power requirement would impose onerous new administrative burdens must be viewed with skepticism.

The Commission attempts to explain away the infrequency of expressive boycotts with the observation that "most people have considered them illegal *per se*." FTC Br. at 33. This assertion lacks any evidentiary or legal support, however. The only "cases" cited by the Commission are FTC consent agreements, each of which was entered without any adjudication of the merits, and each of which expressly disavows any admission of liability—much less *per se* liability.[16] At least so far as the courts have been concerned, rule of reason rather than *per se* treatment has been

[15]*See Market Power Test, supra,* 93 Yale L. J. at 525; *Political Boycott Activity, supra,* 91 Harv. L. Rev. at 689. Indeed, the administrative law judge below appeared to recognize this principle in rejecting complaint counsel's suggestion that the mere discussion at SCTLA meetings of appropriate fee levels to be included in proposed legislation constituted an illegal conspiracy. 107 F.T.C. at 554 n.218.

[16]FTC Br. at 33 & n.28. The Commission is no doubt correct, however, in its assumption that if a *per se* rule *were* established, it would have a substantial deterrent effect upon collective efforts to convey an opinion on issues having mixed political and economic implications. Indeed, a *per se* rule would raise the specter of criminal prosecutions under the Sherman Act for joint *political* activities by competitors.

the nearly universal mode of analysis for boycotts with an expressive component. *See, e.g., United States* v. *North Dakota Hospital Association,* 640 F. Supp. 1028 (D. N.D. 1986); *Osborn, supra,* 499 F. Supp. 553. The Commission itself saw fit to apply the rule of reason in *In re Michigan State Medical Society,* 101 F.T.C. 191 (1983). Thus, a more plausible explanation for the scarcity of case law in this area is that antitrust enforcers, in the exercise of sound discretion, have generally opted to stay out of the political arena. *See Political Boycott Activity, supra,* 91 Harv. L. Rev. at 678-79.[17]

3. The Commission contends that, even if a *per se* rule is not applied, it should not be required to prove market power because adverse competitive effects are demonstrated by the mere fact of the rate increase. Relying upon *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 460-61 (1986), the Commission notes that "'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Id.* (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

As the court of appeals explained, however, "[t]he normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena." 856 F.2d

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[17]The Commission suggests that a market power requirement for expressive boycotts would open the floodgates to boycotts of Medicaid by health care providers. FTC Br. at 33-35, 43. The Commission's concerns are totally unwarranted, however. In addition to the fact that such boycotts have rarely occurred, *id.* at 33, a market power requirement fully protects the Commission's legitimate interests in policing competition. The Commission's argument simply begs the question whether expressive boycotts are, in all cases, damaging to competition. If they are not, then the prospect (unlikely in our view) of an increased number of such boycotts occurring in the future cannot justify *per se* treatment. Notably, the AMA counsels its members and state and local medical societies to avoid activities that could be characterized as a collective refusal to deal with governmental or private payors. *See, e.g.,* American Medical Association, *Collective Negotiation and Antitrust: A Guide for Physicians* (1989).

at 251. Given the political context in which the boycott occurred, political rather than economic power may be the "more explanatory variable" for the increase in CJA rates. *Id.* Indeed, the record shows that the SCTLA boycott was met with considerable sympathy by non-CJA lawyers, the media, and the public at large. It is therefore quite plausible that the SCTLA's efforts succeeded because District officials, acting in accordance with the perceived will of their constituents, decided to improve the amount or quality of services provided under the CJA program.[18]

One thing is certain, however: If the boycott participants lacked market power they could not have exerted any significant economic pressure on the District to increase reimbursement rates. The conclusion would then be inescapable that the increase was the product of "the rough and tumble of municipal politics," 856 F.2d at 252, rather than economic coercion. As such, the boycott could not be suppressed consistent with either *O'Brien* or *Noerr*. It is therefore essential that the Commission assess the lawyers' market power before pronouncing their conduct anticompetitive.

Moreover, if on remand the Commission determines that the lawyers had market power, its inquiry should not end. The Commission still must decide whether that power was significant enough to justify the suppression of their expressive activities. 856 F.2d at 252-53. Because the First Amendment requires exacting proof that an expressive boycott in fact harmed competition, the SCTLA's activities should not be condemned unless any market power that the lawyers possessed was sufficient to cause serious competitive injury. In addition, the SCTLA still must have an

[18]Alternatively, the District may have made a political choice to provide CJA lawyers with a better standard of living and higher professional standing than would otherwise be available to them. Such a choice would undoubtedly be within the District's powers. *See Parker* v. *Brown*, 317 U.S. 341 (1943). When the market provides certain economic actors a return far below the perceived social value of their services, it is not unusual for legislation to attempt to fill the gap.

opportunity to demonstrate that the increase in rates resulted from persuasion, for "[t]he fact that market conditions may favor" the exercise of market power "does not imply that a boycott constitutes unlawful economic coercion rather than bona fide political expression." Hurwitz, *supra*, *Abuse of Governmental Processes*, 74 Geo. L.J. at 115.

Finally, given the possible procompetitive benefits of the SCTLA's activities, the Commission should consider on remand whether such benefits outweighed any adverse competitive effects. In making this analysis, the Commission should take into account the informational value of the boycott. *See* pp. 18-19, *supra*. The Commission must not simply assume—as it does now—that "payment of a higher legal service price" constitutes an "adverse effect of the boycott." FTC Br. at 44. If the District, based on the information generated by the boycott, chose to purchase a higher quantity or quality of CJA services, an increase in expenditures would not represent an adverse competitive effect. *See* R. Bork, *The Antitrust Paradox* 296 (1978). On the contrary, such an increase would epitomize the working of competition to facilitate choice and maximize consumer welfare.

In sum, the First Amendment requires at a minimum that an expressive boycott not be condemned under the antitrust laws absent rigorous proof of a violation. Here, the Commission failed to demonstrate the most fundamental element of a Sherman Act §1 violation, that of competitive harm. The court of appeals therefore correctly held that the Commission had not met its burden.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:

KIRK B. JOHNSON
EDWARD B. HIRSHFELD
MICHAEL L. ILE
AMERICAN MEDICAL ASSOCIATION
535 N. Dearborn Street
Chicago, Illinois 60610
(312) 645-4600

JACK R. BIERIG*
RICHARD D. RASKIN
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Attorneys for Amicus Curiae American Medical Association

*Counsel of Record

July 28, 1989

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1198 and 88-1333

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL TRADE COMMISSION, PETITIONER,

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS/ CROSS-PETITIONERS

RICK HARRIS
410 South Perry Street
Post Office Box 910
Montgomery, AL 36101
(205) 264-9900

ATTORNEY FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") has obtained the written consent of the parties to file this brief, and has filed consent letters with the Court.

The NACDL is a non-profit corporation with a nationwide membership of more than 5,000 lawyers. It is concerned with the protection of individual rights, with reform of criminal law practice and procedure, and with improvement of the conditions under which criminal law practitioners must work, particularly those practitioners who provide counsel to indigent defendants, whether as public defenders or as court-appointed lawyers. The NACDL supports the efforts of underpaid court-appointed counsel, such as the respondents/cross-petitioners in this case, to increase their statutory fees and fee limits.

SUMMARY OF ARGUMENT

Local governments use a variety of methods to fulfill their constitutional mandate to provide free legal counsel to indigent criminal defendants. The District of Columbia used both a Public Defender Service and appointed private counsel to meet this obligation. Only a small proportion of those eligible for appointment to criminal cases in the District of Columbia actually volunteered for them. Although the trial court had authority to appoint attorneys from a much larger segment of the bar than that represented by the respondents/cross petitioners, it relied only upon those who volunteered to accept cases.

Because lawyers do not have the power to refuse to accept criminal cases when appointed to represent indigents, and because refusal to accept such appointments may be punishable as contempt, the court, and not the respondents, had complete control over the supply of attorneys available to represent indigent defendants. Since they could not have refused to accept any cases when appointed, the function of the respondents' "boycott" was purely to communicate the lawyers' distress over the level of statutory fees and its effect on the quality of legal representation offered to indigents.

While the effect of the respondents' boycott, an increase in statutory fees, was anti-competitive, their otherwise lawful efforts to achieve that effect are protected under any reading of the *Noerr-Pennington* doctrine.

ARGUMENT OF LAW

I. Federal Anti-Trust Legislation Does Not Reach the Respondents' Conduct

The Court must here determine whether the Sherman Act[1] and the First Amendment[2] permit the federal government to punish a group of lawyers who, as part of an effort to win passage of legislation which would increase fees paid to appointed criminal defense counsel, noisily stopped their voluntary acceptance of appointed cases. The court of appeals held that the Sherman Act applies to the lawyers' behavior, but found that the First Amendment prohibits government sanctions against the lawyers, absent a showing that the lawyers have economic power in the relevant market. *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988) ("*S.C.T.L.A.*"). We believe that the lawyers' conduct was not coercive but rather was persuasive, and that its essentially communicative aspect shielded it, under the First Amendment, from government reprisal.

A. The District of Columbia Required Only Those Lawyers Who Volunteered to Do So to Accept Appointments to Criminal Cases

Every jurisdiction in the United States must provide, at government expense, counsel to criminal defendants who are unable to raise enough funds to pay for an attorney by their own devices.[3] State and local governments use a variety of methods to fill this prescription, none without

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[1] 15 U.S.C. 1.

[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[3] See, e.g., *United States v. Cronic*, 466 U.S. 618 (1984); *Strickland v. ashington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

cost to taxpayers or the bar. The D.C. government uses a hybrid system. It combines salaried public defenders, who are city employees, with appointed private counsel, sometimes known as "Fifth Streeters,"[4] who are, typically, solo practitioners working from their homes or from part-time offices without secretarial assistance, and who derive nearly all of their income from statutory fees earned in appointed criminal cases.[5]

Not surprisingly, few lawyers are willing to lead the sort of marginal professional existence eked out by the Fifth Streeters. At the time of the boycott, only about 1,200 lawyers had registered for appointed criminal cases. Pet. App. 4a. Most appointed cases, however, were apportioned among an even smaller group of approximately one hundred lawyers. *Id.* To be assigned a case on a given day, an attorney must not only have pre-registered, but must also have telephoned the CJA office of the D.C. Public Defender Service between 7:45 and 8:15 a.m., indicating a willingness to accept a new case that day. *S.C.T.L.A.*, 856 F.2d at 228. Apparently, only a small proportion of even those attorneys who had registered regularly volunteered for appointments in this fashion.

In 1982, the year before the Fifth Streeters' boycott, appointed counsel handled some 19,475 misdemeanor cases and 4,000 felony cases.[6] Pet. App. 157a. For a time, this overwhelming reliance on volunteer appointed counsel was satisfactory to nearly all concerned. It satisfied the Fifth Streeters, by providing them with ample legal work. It

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[4]The tag, "Fifth Streeter," refers to the location of the Superior Court and of the offices of some of the attorneys who voluntarily accept appointment to criminal cases. More importantly, it distinguishes that segment of the bar who regularly represent criminal defendants in Superior Court from more prosperous "uptown lawyers," many of whom have offices on streets connected to Connecticut Avenue. Pet. App. 140a, n. 2.

[5]The four named respondents/cross-petitioners all answered to this description. Pet. App. 148a-151a.

[6]This amounted to eighty-five percent of all indigency cases. Pet. App. 157a.

satisfied the City Council and its constituent taxpayers, by providing ever-unpopular-to-pay-for indigent defense services at bargain basement prices.[7] It satisfied the bench, by providing self-propelled, low-maintenance machinery which matched the names of appointed-lawyers-to-be with the names of indigent criminal defendants. Perhaps it also satisfied some of the uptown lawyers, by providing relief from the likely unpleasant and unremunerative obligation to provide legal assistance to indigent criminal defendants.[8]

B. The Respondents Lacked the Power to Affect the Supply of Indigent Criminal Defense Lawyers

This method was not the only one available to the D.C. Superior Court to provide counsel to indigent defendants. It

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[7]The 1982 payments to appointed counsel in D.C. totaled $4,579,572. Pet. App. 157a. The appropriation to the Public Defender Service ("P.D.S."), which handled only about eight to ten per cent of all indigent cases, was $3,306,000. *Id.* This disparity may be partly attributable to the P.D.S. practice of handling mostly serious and complex cases, but the figures also suggest that appointed criminal defense counsel in D.C. worked cheaply. As early as 1975, the blue-ribbon Austern-Rezneck committee, working under the auspices of the Judicial Conference of the D.C. Circuit and the D.C. Bar, extensively studied indigency practice in the District, and concluded that rates paid to appointed defense attorneys were too low and that they must be increased to ensure effective representation and adequate compensation to counsel. Pet. App. 170a-173a.

[8]See, e.g., ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* §1.5 (1971): "The bar should encourage through every available means the widest possible participation in the defense of criminal cases by experienced trial lawyers. Lawyers active in general trial practice should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel"; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Providing Defense Services* §2.2 (1968): "Assignments [to appointed criminal cases] should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made".

had the manifest power to require all members of the D.C. bar, or all practicing trial lawyers, or all practicing criminal defense lawyers, or even the 1,200 registered lawyers, to shoulder a share of the burden. The duty of a trial court to appoint counsel to represent indigent defendants charged with serious crimes is clear, and its power to do so, even in the absence of a statute, cannot be questioned. *Powell v. Alabama*, 287 U.S. 45, 73 (1932). "Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Id.* Courts have consistently upheld their power to appoint counsel to involuntarily represent indigent defendants, even without compensation.[9]

Under this plenary authority, the D.C. Superior Court could have chosen, at any time, to expand the pool of attorneys from which appointments were made, and it could have required those in the pool, whether expanded or not, to accept cases. Instead, it chose to meet its recurring need for appointed counsel by assigning cases only to those lawyers who picked up the telephone and asked for them.

C. The Respondents' Conduct Was Purely Communicative

When the Fifth Streeters collectively stopped picking up the telephone, they did not and could not have relieved themselves of the obligation to represent any defendants that the court may have ordered them to assist. As mem-

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[9]See, e.g., *Waters v. Kemp*, 845 F. 2d 260, 263 (11th Cir. 1988) ("As an officer of the court, a lawyer has a fundamental duty to perform services pro bono for indigents when called upon by the court.... An attorney may be relieved of his duty to accept a court appointment only when the appointment is likely to impede the due administration of justice"); *United States v. Acceturo*, 842 F. 2d 1408, 1412 (3rd Cir. 1988); *Williamson v. Vardeman*, 674 F. 2d 1211, 1214 (8th Cir. 1982); *United States v. Dillon*, 346 F. 2d 633, 635 (9th Cir. 1965), *cert. denied* 382 U.S. 978 (1966) ("A lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order"); *In Re Frankel*, 293 A. 2d 196 (N. J. 1972), *cert. denied* 409 U.S. 1125 (1973); *In Re Meizlish*, 196 N. W. 2d 129 (Mich. 1972); *People v. Hutchinson*, 195 N. W. 2d 787 (Mich. App. 1972).

bers of the bar, they shared that obligation with all their colleagues. Putting the proposition another way, the Fifth Streeters, as lawyers, lacked the power to refuse to accept new appointments.[10] Their collective act was merely a message, albeit a dramatic one, to the court and to the community. The message was, in essence, that the lawyers were being inadequately compensated and that their clients were being inadequately represented under the existing system.[11] Therefore, the lawyers said, we want it known that we no longer desire to take part in it.

This is far different from the F.T.C.'s characterization of their conduct (also cited in the petitioner's brief at 41) as having "dramatically reduced the supply of lawyers to the city's CJA program," "adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants," and "forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [lawyers]." Pet. App. 96a. The F.T.C. is wrong. As a matter of law, the D.C. Superior Court, and not the lawyers admitted to its bar, controlled and still controls the supply of lawyers to the CJA program.

Unlike the lawyers writing title insurance policies for collectively-fixed prices in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), lawyers appointed to indigent defense cases lack the ability to withhold their services if their

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[10] This is notwithstanding the written petition signed by a number of attorneys which stated, "[U]nless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." *S.C.T.L.A.*, 856 F. 2d at 230. Apparently, none of the boycotting attorneys were appointed to cases by the court while the boycott was in progress, so the collective "refusal" to accept new cases was never tested. Under the authority cited in n. 10, *supra*, any such refusal would have been punishable under the trial court's contempt power.

[11] Even the F.T.C., in its opinion, conceded that "[W]e have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights," Pet. App. 106a, and "[W]e do not question the respondents' genuine concern for their clients", Pet. App. 110a, before finding that the lawyers' motivation was primarily commercial, and not political.

desired price is not met. A threat to do so cannot be carried out, at least without running afoul of a trial court's contempt power.[12] The actual function of such a threat is to communicate that the lawyers are upset. The Fifth Streeters had no coercive power, and no ability to fix prices at all. They could rely only on their ability to communicate and persuade.[13]

D. The Anti-Competitive Goal of the Respondents Was Not Subject to Anti-Trust Sanctions

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[12]Alternatively, the court could require acceptance of appointed cases as a condition for admission to practice before it. See *United States v. Dillon*, *supra*, n. 10.

[13]To the extent the lawyers formed a professional judgment, whether individually or collectively, that their clients were receiving inadequate representation because of the low level of compensation paid to appointed counsel — the F.T.C. does not seriously dispute that this happened, see n. 12, *supra*, while the 1975 report of the Austern-Reznick committee tends to support such a conclusion, see n. 8, *supra*— then surely they had a professional and ethical obligation, and a responsibility to the justice system, to remedy the situation if they could. It is difficult to imagine what additional steps they might have taken short of a boycott. Enlist the aid of the local bar association? They tried that. The D.C. bar passed a resolution calling for a rate increase. Pet. App. 178a. Shortly afterward, a bill providing for a rate increase was introduced in the D.C. City Council, but it died in committee. Pet. App. 178a-179a. Ask the Superior Court's Chief Judge for help? They tried that. He declined because his court might have to consider the legality of any bill passed by the City Council. Pet. App. 179a. Lobby the Mayor's office? They tried that. They were told they needed the Chief Judge's support if the legislation was to get the Mayor's support. Pet. App. 180a. Ask the Chief Judge for help again? They tried that, repeatedly. He always declined. *Id.* Lobby the City Council? They tried that. A hearing was held, the lawyers' fee increase stood unopposed on the merits, and the lawyers were told that no one in the city government opposed their demand, but no funds were appropriated for the increase. Pet. App. 182a-183a. Buttonhole the Mayor? They tried that. He was sympathetic but could provide no source of additional funds. Pet. App. 183a-184a. Threaten to boycott? They tried that. The result was unproductive. Pet. App. 186a-187a.

The *Noerr-Pennington* doctrine,[14] widely discussed in the Administrative Law Judge's findings, the F.T.C.'s opinion, the court of appeal's opinion, the F.T.C.'s brief, and, no doubt, in the briefs of the respondents/cross-petitioners and their other supporting *amici*, immunizes from anti-trust sanctions otherwise lawful attempts by business competitors to communicate with and persuade public officials to adopt legislation or government policy. This is is so even when the sought-after government action would have an anti-competitive effect,[15] and even when the communications used are deceptive to the public.[16]

Even following the restrictive interpretation of *Noerr-Pennington* urged by the F.T.C., see Petitioner's Brief at 14, federal anti-trust law fails to reach the publicized boycott initiated by the respondents in order to induce the D.C. City Council to raise their statutory fees. Because their conduct had no effect on the supply of attorneys eligible for appointment to criminal cases, the boycott itself was not violative of federal anti-trust law. While the lawyers' goal was to enact anti-competitive legislation, under the *Noerr-Pennington* doctrine this did not subject the lawyers to further anti-trust liability.

CONCLUSION

The judgment of the court of appeals should be vacated and the matter remanded with instructions to direct the Federal Trade Commission to dismiss its charges against the respondents.

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[14] *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

[15] *Noerr*, 365 U.S. at 136; *Pennington*, 381 U.S. at 670.

[16] *Noerr*, 365 U.S. at 140. Even if the *Noerr-Pennington* doctrine does not protect the lawyers' boycott, as the court of appeals found, the lawyers' lack of coercive power affecting the supply of CJA lawyers to the Superior Court would demonstrate a lack of economic power in the relevant market. Therefore, the analysis employed by the court of appeals also compels dismissal of the F.T.C.'s charges.

Respectfully submitted:

Rick Harris
410 South Perry Street
Post Office Box 910
Montgomery, AL 36101
(205) 264-9900

Attorney for National Association
of Criminal Defense Lawyers

INTRODUCTION

The Amici States submit this brief in support of the Petitioner Federal Trade Commission. The decision of the District of Columbia Circuit in *Superior Court Trial Lawyers Association v. Federal Trade Commission*, 856 F.2d 226 (D.C. Cir. 1988), should be reversed.

INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.[1] The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.[2] The states play a major role in antitrust enforcement and have a substantial interest in making sure that the antitrust laws are interpreted in accord with antitrust policy and the Supreme

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[1] E.g., *Red Wing Shoe Co., Inc. v. Shearer's, Inc.*, 1989 (CCH) Trade Cas. ¶ 68,575 (Tex. Civ. App. 1989).

[2] 15 U.S.C. § 15(c); *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439 (1945) (common law parens patriae); *Hawaii v. Standard Oil*, 405 U.S. 251 (1972).

Court's prior decisions. Immunizing boycotts that are utilized to impose price-fixing agreements ("price-fixing boycotts") would allow anti-competitive conspiracies to continue unchecked.

Moreover, the attorneys general represent municipalities, counties, state agencies and other governmental entities whose purchases together account for 12% of the gross national product.[3] The attorneys general have a vital interest in maintaining the integrity of the process by which those transactions are accomplished. The novel exemption fashioned by the court of appeals would corrupt the process by which governments acquire goods and services and would virtually invite imposition of price-fixing boycotts against governments.

In addition, these local governments administer numerous programs similar to the District of Columbia's program for appointment of private counsel to represent indigent persons charged with crimes in the District of Columbia Superior Court. Expanding the limits of First Amendment protection in the manner urged by the respondent Superior Court Trial Lawyers ("SCTLA") would create an enormous loophole in antitrust law that would inevitably impede states' efforts to preserve and foster competition.

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[3] U. S. Bureau of the Census, statistical Abstract of the United States 1989, at 421 (109th ed. 1988). In 1987, state and local government purchases amounted to 542.8 billion dollars. *Id.*

As the primary public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

The Amici States support the Federal Trade Commission's contention that a price-fixing boycott directed at a government purchaser is a *per se* violation of the Sherman Act without regard to a demonstration of market power.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the "use of the *per se* rule without proof of market power is inappropriate as applied to a price-fixing boycott that served, in part, to make a statement on a matter of public debate." This Court's most recent pronouncement of the *Noerr* doctrine[4] in *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988), resolves the question whether a price-fixing boycott, such as that at issue here, is protected activity under the First Amendment and beyond the reach of the Sherman Act. Under *Allied Tube*,

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[4] *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 123 (1961).

the SCTLA's price-fixing boycott at issue is not protected as "political activity" and is not protected as a "political boycott." It was unnecessary and redundant for the court of appeals to analyze the price-fixing boycott as "expressive conduct." The proper way to address the First Amendment concerns is with application of the *Noerr* doctrine and not by eroding the *per se* rule.

2. The court of appeals concluded that before a price-fixing boycott could be declared unlawful, proof of significant market power was required in order to demonstrate that the boycott succeeded because it was coercive rather than persuasive. The court of appeals' holding contravenes over eighty years of antitrust jurisprudence in which this Court has consistently held that horizontal combinations formed for the purpose and effect of tampering with the price of a commodity and service are unlawful *per se* under the Sherman Act. Such agreements are unlawful *per se* without any demonstration of market power. Requiring proof of market power to condemn a price-fixing boycott is unprecedented and creates formidable barriers to antitrust enforcement. Moreover, it replaces the efficiency and clarity of the *per se* rule with a novel market power test that promotes confusion.

3. The court of appeals' application of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The absence of market power does not justify a naked restriction on price or output.

Moreover, the purpose of inquiries into market power is to determine the actual or potential anticompetitive effects of an arrangement. Proof of actual anticompetitive effects obviates the need for inquiry into market power. The court of appeals rejected traditional demonstrations of market power and required proof of market power sufficient to demonstrate that the boycott succeeded because it was "coercive rather than persuasive." Such a requirement is unprecedented and is virtually impossible to apply. The court of appeals gave no useful guidance regarding what level of market power suffices to render unlawful a price-fixing boycott that is claimed to be "expressive conduct."

4. If the defense that price-fixing is being used to communicate a point of view can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. It will substantively weaken antitrust enforcement and will encourage price-fixing at least with respect to goods and services purchased by governments.

ARGUMENT

The court of appeals held that a concerted boycott by competing private practice attorneys in order to increase fees paid for their representation of indigent criminal defendants may be constitutionally protected activity. The court recognized that the SCTLA boycott could properly be condemned as a *per se* violation of the Sherman Act unless it came within the protection of the First

Amendment. *Superior Court Trial Lawyers Association*, 856 F.2d at 241.[5]

In reviewing possible sources of protection, the court rejected the claim that SCTLA's conduct was entitled to complete First Amendment immunity under the *Noerr* doctrine. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court also rejected SCTLA's contention that its conduct was a "political boycott" and thereby completely immune under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Id.* Though the court of appeals found the boycott was not immune from the antitrust laws under either *Noerr* or *Claiborne*, it concluded that the conduct could not be condemned without proof of market power. The court reached this conclusion by applying the test for evaluating "expressive conduct" articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). In applying the *O'Brien* test, the court concluded that use of the *per se* rule "without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers Association*, 856 F.2d at 250.

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[5] "Since no 'pro-competitive' justification, that is no justification that is consistent with the purposes of the antitrust laws, has been offered in its defense . . . the boycott could properly be condemned as a *per se* violation of section 1 of the Sherman Act. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 241.

I. THE COURT OF APPEALS EVISCERATES THIS COURT'S DECISION IN *ALLIED TUBE*.

The Amici States assert that the court of appeals erred when it applied the *O'Brien* test after holding that SCTLA's horizontal price-fixing boycott was not immunized under *Noerr* or *Claiborne Hardware* pursuant to this Court's guidance in *Allied Tube*. *Allied Tube* is controlling precedent which resolves the First Amendment issues the court of appeals raised by applying the *O'Brien* test. The court of appeals' action has the effect of nullifying the precedential value of *Allied Tube* in governing the application of the Sherman Act to restraints of trade like the SCTLA boycott.

In the development of the *Noerr* doctrine, this Court has crafted a careful balance between the Sherman Act and the First Amendment. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Allied Tube & Conduit Corp. v. Indian Head*, 108 S. Ct. 1931 (1988). There this Court recognized that the antitrust laws do not apply to concerted solicitation of anticompetitive government action unless the concerted solicitation itself amounts to a mere sham.

The Court in *Noerr* defined for the first time the relationship between the First Amendment right to petition and the Sherman Act. The Court held that an open public campaign designed to influence the legislature would not violate the antitrust laws even though it had an anticompetitive effect. This Court refused to "lightly impute to Congress an intent to invade [First Amendment] freedoms." 365 U.S. at 138. It reasoned that the legislative history of the Sherman Act provided no basis for concluding that its purpose was "to regulate, not business activity, but political activity." *Id.* at 137. In *Pennington*, the Supreme Court extended the doctrine to attempts to influence the executive branch. This Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

In *Allied Tube*, however, this Court determined that even apart from any finding of mere sham, the *Noerr* doctrine does not immunize all petitioning conduct. This Court held that *Noerr* immunity does not protect the collective efforts of a private standards setting organization merely because the model codes agreed upon are subsequently adopted by governments. This Court established guidelines for determining whether collective conduct falls within the ambit of *Noerr*. There the Court said that "the scope of protection depends on the source context, and nature of the anticompetitive restraint at issue." *Allied Tube*, 108 S. Ct. at 1936.

In the instant case, the court of appeals acknowledged that "dicta in *Allied Tube* strongly suggest that *Noerr* does not extend to restraints indistinguishable from the one before us." *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals quoted the following passage from *Allied Tube*:

> We cannot agree with Petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

Allied Tube, 108 S. Ct. at 1938-39 (parallel citations omitted). The court of appeals correctly determined that *Noerr* immunity was not available

to protect the SCTLA boycott from antitrust scrutiny. *Superior Court Trial Lawyers Association*, 856 F.2d at 247.

Moreover, respondents' boycott is not entitled to First Amendment protection as a "political boycott" under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). There, this Court held that a boycott of white retailers by black consumers in order to vindicate important constitutional rights was protected by the First Amendment from a claim that it violated state tort law. The "political boycott" doctrine articulated in *Claiborne Hardware*, however, does not encompass commercial boycotts by economic competitors who stand to reap economic benefit for themselves. Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the *Claiborne* Court said, "[t]he right of business entities to 'associate' to suppress competition may be curtailed." *Id.*

In *Allied Tube*, this Court reiterated that *Claiborne Hardware* is limited to cases that do not involve economic competitors seeking economic benefits.

> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of

> demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.

Allied Tube, 108 S. Ct. at 1941 (parallel citations omitted).

The court of appeals applied the *Claiborne Hardware* analysis to the SCTLA boycott and concluded that it was outside the protection of the First Amendment. The court noted that the First Amendment protection in *Claiborne Hardware* "rests on the findings that the boycott was not motivated by any desire to lessen competition or to reap economic benefits. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 245.

The cited passages from *Allied Tube*, although dicta, virtually dispose of the SCTLA boycott as if it were then before the Court. The SCTLA boycott is not "political activity" protected by the *Noerr* doctrine and is not a "political boycott" protected by *Claiborne Hardware*. The court of appeals concluded, however, that the absence of protection

under either *Noerr* or *Claiborne Hardware* did not conclusively resolve the claim that the SCTLA's boycott is entitled to First Amendment protection.

Notwithstanding the court of appeals' recognition and application of *Allied Tube* in reviewing the SCTLA's boycott, the court determined further analysis was needed before the boycott could be condemned under the Sherman Act. The court's justification for further analysis was the presence of an element of expression contained in the boycott warranting First Amendment protection. *Superior Court Trial Lawyers Association*, 856 F.2d at 247. The court of appeals turned to the test first enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the First Amendment protection of "expressive conduct." This four-part test was devised by this Court to determine whether a Vietnam War protestor's draft card burning was protected under the First Amendment. This Court held that a "regulation is sufficiently justified (1) if it is within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government's interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms was no greater than is essential to the furtherance of that interest." *Id.* at 377.

The court of appeals easily found that condemnation of the SCTLA boycott met the first three parts of the *O'Brien* test. *Superior Court Trial Lawyers Association*, 856 F.2d at 248. With

respect to the fourth requirement, however, -- that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of the governmental interest -- the court of appeals concluded that a demonstration of market power was essential to evaluating the importance of the governmental interest at stake here.

It was error to use the *O'Brien* test after the court had already determined that under *Allied Tube* the price-fixing boycott was commercial activity primarily motivated by economic self-interest and thereby within the reach of the Sherman Act. In determining that the boycott was commercial activity and not political activity, the Court had already balanced the respective interests of society in our system of free enterprise with its unfettered marketplace against the First Amendment rights of speech and petition. The court of appeals recognized that it was in fact "[a]ccommodating the government's interest in regulating harmful economic activity to the right of citizens to engage in joint political action. . . ." *Superior Court Trial Lawyers Association*, 856 F.2d at 246.

The *O'Brien* balancing of governmental rights against individual rights was subsumed in the court of appeals' *Allied Tube* analysis because *Noerr* and *Claiborne Hardware*, in essence, address in an economic setting petitioning the government and speech elements of a boycott as "expressive

conduct."[6] The court of appeals analyzed the SCTLA boycott under *Allied Tube*, balanced the competing interests, and concluded that the government's interest predominates, that is, the Sherman Act was applicable to declare the price-fixing boycott unlawful.

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[6] In *Claiborne*, this Court addressed the validity of economic regulation that "may have an incidental effect on rights of speech and association." *Claiborne Hardware*, 458 U.S. at 912. In *Claiborne*, this Court applied the *O'Brien* test to evaluate the validity of economic regulation that would have rendered the NAACP boycott unlawful, *Id.* at n.47. *Claiborne* analyzed the "petitioning" element of the NAACP boycott under *Noerr*. *Id.* at 913-14. ("It is not disputed that a major purpose of the boycott in this case was to influence governmental action.") The speech element was evaluated under the *O'Brien* test. "The established elements of speech, assembly, association and petition, though not identical, are inseparable." *Id.*, at 911. The following passage from *Noerr* demonstrates that there, the court was in fact engaged in the same sort of analysis.

> The proscription of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. *Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities*, a caution which has been reflected in the decisions of this court interpreting such legislation.

Noerr, 365 U.S. at 141.

To balance these interests once again under *O'Brien* in the guise of "expressive conduct" was redundant. Embarking on the *O'Brien* test after having already determined that the boycott was within the reach of the Sherman Act was error. The court of appeals compounded its error when it reached inconsistent conclusions using the two approaches. The court of appeals in applying *O'Brien* lost sight of the fact that the *Allied Tube* analysis is by its nature limited to an inquiry into whether antitrust laws apply to particular conduct at all. In that sense, *Allied Tube* is a restatement of the *O'Brien* test appropriate to the commercial context of the antitrust laws. Neither *O'Brien* nor *Allied Tube* stand as a warrant for the court to have engaged in wholesale reordering of rules of law already found applicable.

II. THE COURT OF APPEALS' ABROGATION OF THE *PER SE* RULE OBSTRUCTS EFFECTIVE ANTITRUST ENFORCEMENT.

The court of appeals' application of the *O'Brien* case to the facts here is unprecedented. It determined that a naked price-fixing boycott that resulted in actual detrimental effects, could not, on that basis alone, be condemned. This determination was based upon the fact that overt acts in furtherance of the restraint of trade constituted "expressive conduct" which raised First Amendment considerations. The court of appeals concluded that before the restraint of trade could be declared unlawful, proof of significant market power -- which would conclusively demonstrate that the

boycott succeeded because it was "coercive rather than persuasive" -- was required. *Superior Court Trial Lawyers Association*, 856 F.2d at 253.

The court of appeals' holding contravenes over eighty years of precedent, in which this Court has constantly adhered to the principle that horizontal combinations formed for the purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity or service are unlawful *per se* under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *See also United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). The court of appeals' determination also contravenes this Court's statement that even under rule of reason analysis, proof of market power is not necessary to determine the unreasonableness of a restraint of trade if actual anticompetitive effects are shown. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

To require proof of "market power" to condemn a naked price-fixing boycott creates a formidable obstacle to state and federal enforcement of the antitrust laws. The court of appeals' novel market power requirement would, if adopted, complicate, forestall, and possibly preclude condemnation of clearly anticompetitive conduct and weaken deterrence of undesirable economic behavior.

The court of appeals' subordination of the antitrust rights of the public to economic interests -

of competing businessmen is inconsistent with previous statements of this Court regarding the importance of those antitrust rights. For example, this Court, in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Next, the court of appeals also reasoned that the *per se* rule could be abandoned here because it is not a statutory command, but merely a rule of administrative convenience. *Superior Court Trial Lawyers Association*, 856 F.2d at 249. The *per se* rule is more than an administrative convenience.[7]

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[7] Moreover, the court of appeals erred in concluding that the *per se* rule, even if viewed only as an administrative aid, should not be upheld under the *O'Brien* test. In *United States v. Albertini*, 472 U.S. 675 (1985), this Court held that the general exclusion of a "bar letter" receipient from a military open house does not violate the First Amendment, stating that:

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. (Citation omitted.) Instead, an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

Id., at 689.

This Court has recognized that the "*per se* rule" is a valid and useful tool for antitrust policy and enforcement to preserve this nation's economic freedoms.[8] *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1978). This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5 (1958) stated:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

See also 7 P. Areeda, *Antitrust Law*, ¶1509, at 408-414 (1986).

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[8] State antitrust law, either through case law or statute, expressly recognizes price-fixing agreements and other similar conduct as *per se* violations. *E.g.*, Conn. Gen. Stat. Sec. 35-28(a)-(d) (1989); *Wedgewood Investment Corp. v. International Harvester Co.*, 126 Ariz. 157, 613 P.2d 620 (App. 1978); *Oakland-Alameda County Builders' Exchange v. Lathrop Const. Co.*, 4 Cal. 3d 354, 362-365, 93 Cal. Rptr. 602, 482 P.2d 226 (Cal. 1971); *Colorado v. Colorado Springs Board of Realtors*, 692 P.2d 1055, 1062 (Colo. 1984).

If the defense of "expressive conduct" (i.e., that price-fixing is being used to communicate a point of view) can render an otherwise *per se* violation of the antitrust laws lawful, it is likely to be invoked in every case. The result will burden litigation and, by holding out hope of exculpation, tempt more businessmen into naked trade restraints such as the price-fixing boycott at issue here. Thus, the "potential threat to the central nervous system of the economy," emasculation of the Sherman Act, and replacement of its philosophy with one which is "wholly alien to a system of free competition" apprehended and rejected by this Court in *Socony* will be revived.

In addition to prohibiting application of *per se* analysis, the court of appeals' use of market power to determine the lawfulness of a restraint of trade involving "expressive conduct" goes well beyond this Court's prior application of market power analysis. The court of appeals ignored this Court's statements in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984):

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

The court of appeals recognized that the SCTLA boycott was a naked restriction on price or output but still held that market power analysis was essential before the boycott could be declared unlawful. *Superior Court Trial Lawyers Association, passim.*

The court of appeals' decision elevates market power from a mere "surrogate" for anticompetitive effects to the very measure of the government's interest in prohibiting restraints of trade. This application of market power analysis is without precedent.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'
> 7 P. Areeda, Antitrust Law, ¶1511, p. 429 (1986).

FTC v. Indiana Federation of Dentists, 476 U.S. at 460-61.

The court of appeals accepted the Commission's findings of the SCTLA boycott's actual detrimental effects.[9] But, the court of appeals rejected the conclusion that such proven effects mandated a determination of unlawfulness. In addition, the court of appeals cautioned that even a finding of significant market power by the Commission on remand may not justify the condemnation of an "expressive" boycott. The court of appeals' imposed duty to weigh the value of alleged expressive conduct against the potential harm from such conduct, as measured by the participants' market power, obviously exceeds the proper role of any court.

The court of appeals' decision would replace the efficiency, clarity and certainty of the *per se* rule with a novel market power test that will promote confusion and attempted restraints of trade in the name of "expressive conduct." This decision is devoid of useful guidance to aid the Commission or the Amici States to determine what future expressive price-fixing boycotts and other types of *per se* restraints may remain unlawful.

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[9] The effects "dramatically reduced the supply of lawyers to the city's indigent defendant program; adversely affected the city's ability to meet constitutional obligations to provide counsel for indigent defendants; and forced the city government to increase CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the [boycotters]." *See Superior Court Trial Lawyers Association*, 856 F.2d at 251.

The court's opinion, raises the possibility that society must tolerate anticompetitive activities if they can be successfully packaged as "expressive" boycotts.

The Amici States, therefore, respectfully request that this Court reject the court of appeals' market power requirement for horizontal price-fixing boycotts and other types of conduct that have been previously determined by this Court to be unlawful *per se*. The application of market power analysis to substantiate an otherwise naked restriction on competition whenever "expressive conduct" is present, emasculates the Sherman Act, removes the deterrent effect of the *per se* rule and restricts effective law enforcement. The proper balancing test is that expressed in *Allied Tube* concerning applicability of the *Noerr* doctrine and *Claiborne Hardware*.

III. CROSS-PETITIONERS' CLAIM THAT THEIR PRICE-FIXING BOYCOTT IS "POLITICAL ACTIVITY" BEYOND THE REACH OF THE ANTITRUST LAWS IS WITHOUT SUPPORT.

Respondents, through their cross-petition, attempt to shroud their naked price-fixing boycott from antitrust scrutiny by asserting that the boycott is protected under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as "political" activity. The Amici States are aware of no legal basis or case precedent to support respondents' claims. As presented earlier, *Allied Tube* resolves this issue.

Moreover, respondents' claimed motivation to advance the constitutional rights of indigent criminal defendants should not totally remove a price-fixing boycott from the scope of the antitrust laws. If so, antitrust enforcement will become dependent upon the creativity of the participants of a particular restraint of trade to invent political and social objectives for their anticompetitive actions. Businesses will use this "political activity protection" to apply coercive economic sanctions against governmental bodies to force regulatory changes concerning their businesses whenever they disagree with a governmental regulation or rule. It will also encourage predatory activities in the name of "political concerns." The court of appeals acknowledges as much in the following passage:

> [I]mmunizing all non-violent boycotts aimed at affecting the legislative process would free the businesses that must now compete to supply this tremendous demand instead to "lobby" for increases in the prices they receive by collectively withholding production. . . . This is the stuff of which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century.

Superior Court Trial Lawyers Association, 856 F.2d at 247.

The Amici States request that this Court reject respondents' argument. *Claiborne Hardware* does not permit the conclusion that a price-fixing

boycott or other restraints of trade are "political" activity protected under the First and Fourteenth Amendments whenever political and social objectives may be advanced. Indeed, this Court previously rejected this exact argument. In *Allied Tube*, this Court determined that restraints of trade are not protected under *Claiborne Hardware* where the participants were "at least partially motivated by the desire to lessen competition, and . . . stood to reap economic benefits. . . .," 108 S. Ct. at 1941.

Limiting *Claiborne Hardware* to situations where there is an absence of anticompetitive intent strikes a proper balance between First Amendment rights and government's legitimate and substantial interests in protecting competition. Reaffirming *Allied Tube* will continue to provide protection from the antitrust laws for true political activity such as occurred in *Claiborne Hardware* and *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). Price-fixing boycotts or other restraints of trade with political attributes such as occurred in *Allied Tube* and this case, however, will continue to be subject to the full force and effect of the federal and state antitrust laws.[10]

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[10] Respondents in their cross-petition have not challenged the FTC's factual determination that respondents' boycott was designed to restrain competition for the direct economic benefit of its members. Also, the court of appeals' opinion specifically affirmed the FTC's finding that the boycott was motivated primarily by "economic self-interest." *Superior Court Trial Lawyers Association*, 856 F.2d at 246. These facts preclude a determination that respondents' boycott was "political" activity entitled to First Amendment protections.

Price-fixing boycotts and other restraints of trade performed with anticompetitive intent cannot be condoned as part of the "political" process.

CONCLUSION

The District of Columbia Circuit's opinion should be reversed.

DATED June 22, 1989
Phoenix, Arizona

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona
ALISON J. BUTTERFIELD
Chief Counsel
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4551

ROGER A. TELLINGHUISEN
Attorney General
JEFFREY P. HALLEM
Assistant Attorney General
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

By:

ROBERT K. CORBIN
Counsel of Record

Supreme Court, U.S.
FILED
AUG 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1198 and 88-1393

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
RESPONDENTS

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION, CROSS-RESPONDENT

**On Writs Of Certiorari To The
United States Court Of Appeals For The
District of Columbia Circuit**

BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the *Noerr* doctrine immunizes from liability under the antitrust laws a boycott designed solely to persuade the political branches of government to enact legislation, where the boycotters lacked market power—and therefore had no chance of obtaining their goal through economic coercion rather than political persuasion—and in addition were motivated by substantial, bona fide, noneconomic concerns.

2. Whether the First Amendment bars the imposition of antitrust liability upon participants in an expressive boycott where the participants lacked market power and the boycott accordingly could not have harmed competition.

3. Whether, in a case in which proof of market power is required to distinguish an economically coercive boycott from one that is simply politically persuasive, it is permissible to base a finding of market power solely on the fact that the boycott achieved its purpose.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1198

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., RESPONDENTS

No. 88-1393

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL., CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION, CROSS-RESPONDENT

On Writs Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

INTEREST OF THE AMICI CURIAE

The Washington Council of Lawyers ("the Council") is a nonpartisan, voluntary bar association created in 1971. The Council's purpose is to promote the practice of law in the public interest. Its membership includes attorneys from every segment of the Washington, D.C. legal community, as well as law students and members of related professions.

The National Legal Aid and Defender Association ("NLADA") is a private, nonprofit, national membership organization headquartered in Washington, D.C. Its purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons who lack the means to retain counsel. NLADA represents approximately 1775 organizations that provide representation to poor people in civil cases and 735 public defender offices engaged in representing indigent criminal defendants. NLADA's membership includes most of the country's public defender offices and legal services agencies, as well as appointed counsel and other private practitioners.

The Association of Trial Lawyers of America ("ATLA") is a voluntary association of about 60,000 attorneys around the country. ATLA's members primarily represent tort victims and criminal defendants.

Amici each have as one of their principal goals the provision of high-quality legal representation to persons of limited means. They believe that providing adequate compensation for court appointed attorneys is essential if that goal is to be achieved. In the instant case, the members of the Superior Court Trial Lawyers Association attempted to persuade the citizens and government of the District of Columbia that the statutory compensation rates for attorneys appointed to represent indigent criminal defendants were too low to guarantee quality representation. One component of this lobbying campaign was a highly visible refusal to take on new appointed cases. Amici believe that an expressive boycott undertaken for purposes of petitioning the government for redress of grievances is fundamentally different from the covert economic boycotts routinely condemned under the antitrust laws. Amici submit this brief to demonstrate why the antitrust laws and the Constitution should be construed to insulate such expressive boycotts from antitrust liability.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case differs substantially from a run-of-the-mill antitrust action, in which the challenged agreement among competitors is covert, has nothing at all to do with the legislative process, and is motivated solely by the desire for economic gain. The conduct that is the target of the Federal Trade Commission's enforcement effort here indisputably lies at the very core of the right to petition government for redress of grievances: a public boycott aimed at the government and intended to focus the attention of both government officials and the public at large on the need for legislation to remedy a pressing public problem—the severe deficiencies in the provision of legal services to indigent defendants in the District of Columbia.

Somewhat surprisingly, the Commission refuses even to recognize—let alone accommodate—the significant First Amendment aspect of the boycott conducted by the Superior Court Trial Lawyers Association ("SCTLA"). The Commission simplistically labels the boycott "price-fixing" (*e.g.*, Br. 14, 16, 23, 24, 32, 35, 42, 43), in the apparent belief that affixing that label will somehow mask the quite different context in which this boycott arose.[2] And it asserts that the Trial Lawyers' direct lobbying effort in no way resembles the conduct protected in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The antitrust laws obviously have some application to boycotts by those who enter into economic relationships with governmental entities. Even government is entitled to a measure of protection against economic coercion and anticompetitive conduct. At the same time, however, it must be recognized that policy decisions concerning government purchases of goods and services—such as deci-

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[2] In fact, of course, the Trial Lawyers did not engage in price fixing, but rather in a concerted refusal to deal. They did not agree upon a price and indeed accepted the take-it-or-leave-it offer that was presented to them by the District government. Pet. App. 10a, 82a, 204a.

sions regarding the provision of legal services to the poor—frequently have a significant political as well as economic component, especially when those decisions are reached through the political process. That political aspect of the relationship between the District and the Trial Lawyers—and the political context in which the relationship was hammered out—counsels caution lest the antitrust laws be applied in a manner that trenches improperly and unnecessarily on the right to petition government.

These considerations favor an approach that exempts political boycotts from antitrust scrutiny, while preserving regulation of commercial boycotts. Indeed, such an approach is compelled by the *Noerr* doctrine, which immunizes political activity against regulation under the Sherman Act. Two factors are relevant in delineating the class of political boycotts protected by *Noerr*. The first is whether the participants in the boycott exercised market power. A boycott may either persuade or coerce; if the participants lacked market power, "the boycott must have succeeded out of persuasion and been a political activity" and *Noerr* immunity applies. Pet. App. 60a (Silberman, J., concurring). That principle is dispositive in this case, for the Commission has not shown that the Trial Lawyers exercised market power.

Even if the SCTLA could be shown to have had market power, it would be immune under *Noerr* if the motivation of the boycott participants was something other than economic self-interest. If a noncommercial motive predominated, or if the boycott only barely met the market power test and was motivated by a substantial noncommercial motive, the boycott would be protected under *Noerr*.

If antitrust immunity were not available under *Noerr*, it would be required by the First Amendment. Boycotts such as this one clearly qualify as expressive conduct protected by the First Amendment. Government regulation therefore must be narrowly tailored to serve a substantial government interest and may not reach beyond

what is necessary to further that interest. Condemning an expressive boycott without proof of market power, as the FTC did here, violates this standard. A boycott that does not wield market power cannot harm competition; the government's interest in preventing anticompetitive conduct accordingly can be protected fully—and the burden on speech substantially reduced—by requiring proof of market power before an expressive boycott may be condemned under the antitrust laws.

ARGUMENT

I. THE *NOERR* DOCTRINE PROHIBITS THE IMPOSITION OF ANTITRUST LIABILITY IN THIS CASE

This Court held in *Noerr* that—as a matter of statutory construction—the Sherman Act does not reach concerted efforts to restrain trade that involve petitioning of government officials. The Court observed that nothing in the statute's legislative history indicates that Congress intended to regulate political activity and, in addition, a broader construction of the statute would infringe upon the right to petition protected by the First Amendment. 365 U.S. at 137-138; see also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The Court recently made clear that the availability of *Noerr*'s protection depends on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). Despite this express determination that immunity turns on the precise factual context in which a *Noerr* claim is raised, the FTC proposes (Br. 14-17) several categorical limits on *Noerr*'s reach that would preclude consideration of the facts surrounding the boycott in this case. These limits are wholly unjustified. Contrary to the FTC's assertions, boycotts are not categorically excluded from *Noerr*'s protective umbrella. Rather, as we show below, where an examination of the relevant factors indicates that a boycott aimed at the government is primarily political—rather than primarily

commercial—in nature, that boycott is entitled to *Noerr* immunity.

A. The *Noerr* Doctrine Is Not Limited To Restraints Of Trade That Stem From Government Action, But Also Encompasses Private Restraints Incident To The Exercise Of The Right To Petition

The FTC argues (Br. 15-16) that *Noerr* extends only to restraints of trade that result from governmental action and has no application to wholly private restraints that are incident to the exercise of the right to petition. That crabbed interpretation of the *Noerr* doctrine already has been rejected by this Court.

In its recent decision in *Allied Tube*, the Court recognized that the *Noerr* doctrine has two separate aspects. First, where a challenged restraint of trade results from valid government action, "those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 108 S. Ct. at 1936. Second, "*where, independent of any government action, the anticompetitive restraint results directly from private action*, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity." *Ibid.* (emphasis added; citation omitted).

The Court applied the latter principle in *Noerr* itself. One of the arguments in that case was that the railroads' publicity campaign by itself violated the Sherman Act, without regard to the effect of any governmental action stimulated by the publicity campaign. The Court rejected the contention, declining to subject such "political" activity to regulation under the Sherman Act. 365 U.S. at 140-141, 143-144. Similarly, the Court in *Allied Tube* did not end its consideration of *Noerr's* applicability when it concluded that the challenged restraint was the result of private, not governmental, action. See 108 S.Ct. at 1938. Rather, the bulk of the Court's opinion ad-

dressed whether *Noerr* immunity extended to this wholly private restraint because the restraint and its effect "were incidental to a valid effort to influence governmental action." *Ibid.*; see *id.* at 1938-1942. The latter discussion was necessary only because the Court has rejected the narrow view of *Noerr* advanced by the FTC here.

B. There Is No "Boycott Exception" To The *Noerr* Doctrine; Boycotts Are Subject To The Same Analysis As Other Private Restraints

The Commission also argues (Br. 15-17) that *Noerr* immunity never extends to a group boycott, regardless of the circumstances surrounding the restraint. This Court has never endorsed that proposition and there is no reason that it should do so here. A boycott should be subjected to the same analysis as any other restraint of trade.

The Court did observe in *Noerr* that a publicity campaign designed to sway public opinion and ultimately influence legislation bears no resemblance to boycotts and other kinds of agreements that often are held to violate the Sherman Act. 365 U.S. at 136. But it did not in any way indicate that the principles set forth in that decision may never apply to any boycott, regardless of the context in which it occurs. Because *Noerr* did not involve a boycott, the Court had no occasion to address the issue.

The FTC's reliance (Br. 16-17) on *Allied Tube* is similarly misplaced. The defendant in that case had argued "that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." 108 S.Ct. at 1938. In the course of rejecting that "absolutist position," the Court listed examples of various types of conduct—including horizontal boycotts—that would be protected if the defendant's extreme approach were adopted. *Id.* at 1938-1939. Significantly, the Court *did not* hold that the sorts of conduct listed could never be eligible for protection under *Noerr*. After setting

forth its list of examples, the Court "conclude[d] that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." *Id.* at 1939. Far from establishing categorical exclusions from *Noerr*, therefore, the Court simply announced that proof of a restraint's impact on legislation is not by itself sufficient to invoke *Noerr;* analysis of the context and nature of the activity is also required. See *id.* at 1936, 1941 n.10, 1942. *Allied Tube* thus indicates that all restraints are equally eligible for protection under *Noerr*; the applicability of the doctrine depends on an assessment of the particular restraint at issue.

Indeed, a categorical exclusion of the sort hypothesized by the FTC would not make any sense. The *Noerr* doctrine by definition comes into play only when the concerted action in question would otherwise violate the antitrust laws (if there were no antitrust violation, there would be no need for immunity). What basis could there be for extending the doctrine to some categories of antitrust violations and not others? The fact that some boycotts are classified as *per se* violations surely provides no reason for the distinction. *Per se* restraints are not classified as such because they cause greater damage to competition in every case; judicial experience simply justifies the conclusion that they are virtually always unreasonable. See page 25, *infra.* A single restraint held invalid under the rule of reason may inflict more damage upon competition than any number of *per se* violations. Accordingly, it would be much more logical to follow the course outlined in *Allied Tube*: judging *Noerr*'s applicability by utilizing the same standard for all restraints.

Two additional factors would make it especially inappropriate to exclude all group boycotts from *Noerr*'s protective umbrella. First, the scope of the term "group boycott" in this context is not at all clear. The Court has emphasized that "boycotts are not a unitary phenomenon." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 543 (1978). It has recognized that "there is more con-

fusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine," and has concluded that "[s]ome care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (citation omitted). The protean nature of concerted refusals to deal—and the resulting murky boundaries of the *per se* rule in this context—counsel against limiting the scope of *Noerr* immunity in the manner suggested by the FTC.

Second, the group boycott has long been accepted in this country as a legitimate and important vehicle for achieving social change. As the court of appeals itself recognized, "boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." Pet. App. 46a; see also *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982). Among the many examples of boycotts in American history are the refusal of the American colonists to import British goods in order to protest the Stamp and Townsend Acts and the boycott of public transportation by black citizens of Montgomery, Alabama to protest racial segregation. Since Noerr is designed to insulate political activity from antitrust liability, it would make little sense to exclude from its scope a kind of activity that often is used for political purposes.

In sum, boycotts are not and should not be categorically excluded from *Noerr* protection. The availability of *Noerr* immunity with respect to any boycott—including the one in this case—turns upon an assessment of the context and nature of that boycott. It is to that inquiry that we now turn.

C. Examination Of The Nature And Context Of The Trial Lawyers' Boycott Establishes That The Trial Lawyers Are Entitled To *Noerr* Immunity

The threshold inquiry under *Noerr* is whether the challenged conduct was intended to influence governmental

action. See *Allied Tube*, 108 S.Ct. at 1938-1939; *California Motor Transport*, 404 U.S. at 510-511; *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965). There can be no doubt that this requirement is satisfied here. The Trial Lawyers clearly initiated the boycott in order to influence the government of the District of Columbia. The boycott was aimed directly at the D.C. government and had the purpose of convincing the citizens and their elected representatives that the compensation of CJA attorneys was inadequate.[3]

Allied Tube directs that once this threshold requirement is satisfied, the "context" and "nature" of the restraint must be examined to determine whether *Noerr* immunity applies. The nature of the SCTLA's boycott and the context in which it occurred together indicate that that boycott should come within the protection of *Noerr*.

1. Noerr *Immunity Applies To The Trial Lawyers' Boycott Because The Boycott Was A Key Element Of A Broad Public Campaign To Lobby The Legislative And Executive Branches Of The D.C. Government*

Activities directed at influencing the political branches of government lie at the core of the conduct protected by the *Noerr* doctrine. In *Noerr* itself, the Court stated (365 U.S. at 137):

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would

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[3] See, *e.g.*, Pet. App. 47a, 79a, 115a; J.A. 183-184 (testimony of Ralph Perotta), 506 (investigational hearing of Reginald Addison), 466-467 (deposition of Roger Pickens).

have no basis whatever in the legislative history of that Act.

The Court concluded for these reasons that the Sherman Act did not regulate a publicity campaign designed to create public support for legislation.

Applying the same principle, the Court reached a different result in *Allied Tube*. Because the challenged conduct in that case "took place within the context of the standard-setting process of a private association," and was therefore one step removed from the political process, the Court held that the defendant's efforts to influence that association should not be given "the same wide berth accorded legislative lobbying." 108 S.Ct. at 1939. The private context in which the conduct occurred weighed against applying *Noerr* immunity. *Id.* at 1939-1941; cf. *California Motor Transport*, 404 U.S. at 511-513 (although *Noerr* extends to petitioning of the judiciary, some conduct that might be acceptable in the political arena may be sanctionable in the judicial forum).

The present case resembles *Noerr* more than *Allied Tube*—the boycott here took place "in the open political arena, where partisanship is the hallmark of decisionmaking." *Allied Tube*, 108 S.Ct. at 1940. The boycott was focused upon the government itself, seeking to gain attention for and redress of the Trial Lawyers' grievances. Indeed, this is a stronger case for *Noerr* immunity because, unlike even *Noerr* (see *id.* at 1938), this case involves direct petitioning of the government. It is difficult to imagine conduct more intimately involved in the political process.

Moreover, the Trial Lawyers' action closely resembles *Noerr* in two other respects. The Court in *Noerr* emphasized the public nature of the defendants' campaign, which involved a broad variety of techniques for soliciting public support, including the use of circulars, speeches, and newspaper and magazine articles. See 365 U.S. at 142-143. In a representative democracy, gaining the public's support is often an essential prerequisite to

persuading the government to adopt a proposal. Concerted activities accompanied by bona fide efforts to win the sympathies of the populace are thus more likely to have a political orientation—and are accordingly more deserving of protection under *Noerr*—than concerted activities conducted outside the public arena that do not depend at all upon public support for the satisfaction of their goals.

The Trial Lawyers engaged in considerable efforts to generate favorable publicity. They conducted press conferences, issued press releases, granted interviews, engaged in nonviolent picketing, passed out pamphlets, and held rallies.[4] These efforts were extremely successful. The boycott received substantial coverage—most of which was favorable—in the local, national, and international broadcast and print media.[5]

A second way in which this case resembles *Noerr* is that the challenged restraint was part of a broader lobbying campaign directed at the political branches of government. See *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 783, 785 (E.D. Pa. 1957), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds, 365 U.S. 127 (1961). The Trial Lawyers used a variety of means to obtain redress of their grievance through the political process. Aside from the boycott, they testified before the D.C. Council in favor of an increase in compensation rates and conducted an extensive lobbying campaign during which they pled their case to the mayor, his aides, the Chief Judge of the D.C. Superior Court, and key members of the D.C. Council and the

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[4] See, *e.g.*, Pet. App. 47a, 79a; J.A. 225-229 (testimony of Karen Koskoff), 253-254 (Addison testimony), 260-262 (testimony of Nelson Kline), 268-269 (testimony of Joanne Slaight), 461-462, 466-467 (Pickens deposition), 506 (Addison deposition), 523-525 (Koskoff deposition), 914-917 (SCTLA press kit), 918-920 (SCTLA pamphlet).

[5] See J.A. 896-900, 921-954 (newspaper and magazine articles and transcripts of television coverage); see also *id.* at 398-399 (testimony of David Isbell).

United States Senate and their aides.[6] These facts strongly bolster the conclusion that the boycott was simply an additional means of bringing the matter to the attention of the government and the public.

Because the conduct at issue here can only be characterized as direct petitioning of the government, it plainly is "an activity that has traditionally been regulated with extreme caution." *Allied Tube*, 108 S.Ct. at 1940. The context in which the boycott took place accordingly weighs strongly in favor of recognizing *Noerr* immunity in this case. *Allied Tube*, 108 S.Ct. at 1940.

Indeed, some language in *Allied Tube* indicates that this factor is dispositive. The Court there stated that "*at least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability." 108 S.Ct. at 1941 n.11 (emphasis added in part). Here, where the conduct occurred in the thick of a political battle, there is considerable basis for concluding that *Noerr* applies for that reason alone. The Court need not reach that question, however, because the second factor identified in *Allied Tube*—the nature of the restraint—also weighs in favor of *Noerr* immunity.

2. *The Nature Of The SCTLA's Boycott Indicates That It Is Entitled To* Noerr *Immunity*

In assessing the "nature" of a particular restraint to determine whether *Noerr* immunity applies, the operative dichotomy is between "commercial activity that has traditionally had its validity determined by the antitrust laws themselves" and activity, "[t]he essential character [of which is] * * * political." *Allied Tube*, 108 S.Ct. at 1939, 1940. Boycotts, taken as a class, differ markedly from the restraints in *Noerr* (which the Court found to be "political") and *Allied Tube* (which the Court placed

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[6] See, *e.g.*, J.A. 183 (Perotta testimony), 217-221 (Koskoff testimony) 246-248 (Addison testimony), 792 (letter from Perotta to Mayor Barry).

in the "commercial" category) because they have one foot in each camp. See *Claiborne Hardware*, 458 U.S. at 888 (likening boycotts to "chameleons"). Boycotts in the commercial context have long been scrutinized under the antitrust laws. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914). At the same time, as we have discussed (at 9), boycotts are a well-recognized—and frequently utilized—means of political expression. This Court concluded as much in *Claiborne Hardware*, holding that expressive boycotts are protected by the First Amendment. See 458 U.S. at 907-915.[7]

There are three possible ways in which the "nature" aspect of the *Noerr* inquiry could take account of the dual character of boycotts. The Court could adopt the course of action proposed by the FTC: ignore the political aspect of boycotts and withdraw *Noerr* immunity from all boycotts. But that approach would mean that even a wholly symbolic boycott—for example, five lawyers engaging in a joint vigil/work stoppage in front of the District Building to protest the CJA pay scale—could lead to liability under the Sherman Act. Penalizing such obviously political action is impossible to square with the principles set forth in *Noerr*.

Alternatively, the Court could take the opposite tack, treating all boycotts as political conduct for purposes of assessing the nature of the restraint. As discussed above (at 13), when a boycott takes place in the legislative lobbying context, there is considerable force to classifying it as political activity protected by *Noerr* immunity.

Finally, the Court could reject each of these absolute approaches and instead distinguish boycotts that are essentially political in nature—and therefore eligible for *Noerr* immunity—from those that are essentially com-

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[7] In this respect, boycotts are quite different from other recognized restraints on competition. Price fixing, for example, is not known as a means of political expression.

mercial in nature—and for that reason unprotected. Drawing such a distinction would accommodate the general interest in thwarting anticompetitive conduct with the interests underlying *Noerr*. Dividing boycotts into these groups is not a terribly difficult undertaking. Two factors are relevant: (1) the extent to which the boycott is aimed at persuading, as opposed to coercing decisionmakers, and (2) the extent to which the boycott participants are motivated by reasons other than economic self-interest.

As Judge Silberman observed in his concurring opinion below, a boycott that "coerce[s] the government *qua* economic actor creates a distortion of the market and the political process." Pet. App. 60a. Such a boycott is less "political" than a boycott whose power is limited to its political persuasiveness and whose success therefore could be a result only of prevailing in the hurly burly of the political battlefield.

A basic building block of antitrust analysis—the market power inquiry—provides a useful means of distinguishing between a persuasive boycott and a coercive one. If the participants in a boycott lack market power, "the boycott must have succeeded out of persuasion and been a political activity. But, if there is market power, one must assume, for antitrust purposes, it came into play and that the boycott was primarily commercial." Pet. App. 60a.[8] Where the participants in a boycott aimed at the government lack market power, and therefore lack the ability to coerce, their boycott should be classified as a political one that falls within the protection of *Noerr*.[9]

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[8] One author has concluded that *Noerr* immunity should be extended to boycotts that are predominantly political in nature where an assessment of indicia of market power indicates that the boycott participants did not exercise market power. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 115 (1985).

[9] Using the market power inquiry to determine whether a boycott aimed at the government is persuasive—and hence political—rather

A second criterion that should be considered is whether the participants in the boycott are motivated by concerns other than economic self-interest. This factor comes into play only if the boycott participants possess market power: boycotters who lack market power need not have any non-economic motivation in order to qualify for *Noerr* immunity. The Court has made clear that self-interested boycotts qualify for *Noerr* protection as long as other factors substantiating the political nature of the action are present. *Allied Tube*, 108 S.Ct. at 1941 n.11; *Pennington*, 381 U.S. at 669-670. *Noerr* itself held that "at least insofar as [concerted activity is] directed toward obtaining governmental action, its legality [is] not at all affected by any anticompetitive purpose it may have * * *." 365 U.S. at 139-140.[10]

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than coercive—and thus commercial—has the effect of requiring application of the rule of reason rather than the *per se* rule. This makes perfect sense because the rationale underlying the *per se* rule does not hold if the challenged conduct likely succeeded for political rather than economic reasons. The *per se* rule applies only to restraints of trade that by their very nature have a "pernicious effect on competition" and "lack * * * any redeeming virtue." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). If there is any doubt about whether a practice "threatens 'the central nervous system of the economy,'" the *per se* rule should not apply. *Broadcast Music, Inc.* v. *Columbia Broadcasting Syst., Inc.*, 441 U.S. 1, 23 (1979) (citation omitted). It is far from clear that all or even most boycotts aimed at government—which have long been an accepted instrument of political discourse—have a pernicious effect on competition and lack any redeeming value. Applying the *per se* rule to such boycotts is therefore unjustified on the *per se* rule's own terms.

[10] A majority of the court of appeals concluded that the absence of a predominant unselfish motivation can by itself be a reason for denying *Noerr* protection. See Pet. App. 41a. It did not indicate how this rule could be squared with *Noerr* and *Allied Tube*, both of which expressly rejected such a notion. And the court's approach—like that advocated by the FTC—leaves no room for self-interested symbolic boycotts that succeed by dint of political persuasiveness rather than economic power. Indeed, the majority did not respond at all to Judge Silberman's telling criticism of its approach and his suggestion that market power provided a relevant

Motivation matters only if the market power inquiry reveals that the boycott has a significant coercive element. In the United States, unselfish motive is closely identified with political activity. The Nation has a long tradition of political activism undertaken for unselfish reasons and this Court itself has indicated that expressive boycotts of this nature contain "elements of majesty." *Claiborne Hardware*, 458 U.S. at 888. For that reason, boycotters who possess market power are entitled to *Noerr* protection if the predominant reason for their boycott is not economic self-interest. This factor explains the result in *Claiborne Hardware*. The boycotters in that case clearly did have market power: they constituted more than three-quarters of the population of Claiborne County. *NAACP* v. *Claiborne Hardware Co.*, 393 So. 2d 1290, 1295 (Miss. 1981), rev'd on other grounds, 458 U.S. 886 (1982). Because their predominant motivation was to stimulate general social and political change, however, their boycott could not be confused with the commercial boycotts that are "normally held violative of the [antitrust laws]" (*Noerr*, 365 U.S. at 136). Lower courts have relied upon analogous facts in finding expressive boycotts protected under *Noerr*. See, *e.g.*, *Missouri* v. *National Org. for Women ("NOW")*, 620 F.2d 1301, 1314-1315 (8th Cir.), cert. denied, 449 U.S. 842 (1980).

In some cases, it may not be clear whether participants in a boycott aimed at the government possess market power or whether their predominant motivation is economic self-interest. In such cases, the Commission and the courts should consider the two factors together. If the boycotters possess some degree of market power, but not an overwhelming amount, then the fact that they have a substantial—though not necessarily predominant—unselfish motivation could tip the balance in favor of viewing their boycott as political, rather than commercial.

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and appropriate criterion for distinguishing between protected and unprotected boycotts. Pet. App. 58a-61a.

Application of these criteria in the present case establishes that *Noerr* immunity is warranted. The current record strongly suggests that the Trial Lawyers lacked market power and that their boycott succeeded because it was politically persuasive, not economically coercive. For example, the participants in the strike were far outnumbered by non-participants who were qualified to accept criminal appointments.[11] Moreover, the record is replete with evidence that the D.C. government had always favored increasing reimbursement rates[12] and received the necessary *political* impetus to do so because of the favorable publicity generated by the boycott.[13] (Indeed, if the government had been coerced into raising the rates, it could have brought an action for damages against the SCTLA. Its failure to bring such a suit strongly suggests that its action was voluntary.)

If the Court is not convinced that market power was absent based on the existing record, it should remand for further factual development. As we discuss in greater detail below (at 30), the FTC has at this point fallen far short of proving that the Trial Lawyers had any market power at all. See also Pet. App. 53a-57a.

As for the question of motivation, it is clear—as the court of appeals acknowledged (Pet. App. 43a)—that the Trial Lawyers were motivated at least in part by selfless concerns. The record is uncontroverted that these attorneys believed that higher rates of compensation would result in better service for indigent defendants

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[11] See J.A. 121-122 (testimony of Francis Carter), 375 (Isbell testimony).

[12] See, *e.g.*, J.A. 174, 176, 187 (Perotta testimony), 208, 217-218, 222 (Koskoff testimony), 249 (Addison testimony), 302 (Pickering testimony), 382 (Isbell testimony). Indeed, as the New York Times reported, "[t]he unusual thing about the lawyers' planned job action is that almost no one disagrees with their argument." J.A. 900.

[13] See J.A. 185-187 (Perotta testimony), 363-365 (testimony of Sterling Tucker), 399 (Isbell testimony), 497-498 (Perotta investigational hearing).

and that a boycott would help achieve that end.[14] Several state courts have emphasized that the quality of legal representation is directly related to the adequacy of compensation. See, *e.g.*, *White* v. *Board of County Comm'rs*, 537 So. 2d 1376, 1380 (Fla. 1989); *Jewell* v. *Maynard*, No. 18320, slip op. 16-17 (W. Va. Apr. 26, 1989); see also *Kansas ex rel. Stephan* v. *Smith*, 242 Kan. 336, 747 P.2d 816 (1987); J.A. 322-323, 327 (testimony of Professor Geoffrey Hazard). When the evidence indicating that the Trial Lawyers' success was due to persuasion, not coercion, is viewed in conjunction with the evidence that these attorneys did have a strong—if not predominant—unselfish motivation, it is clear that their boycott was political, not commercial in nature.

D. Construing The *Noerr* Doctrine To Immunize Non-Coercive Expressive Boycotts Will Not Hamper Antitrust Enforcement

Providing *Noerr* protection to boycotts aimed at the government will not have the apocalyptic effects of which the FTC complains (Br. 20). For one thing, such conduct is relatively rare and the Commission has provided no indication that the decisions of other courts according *Noerr* protection to expressive boycotts[15] have resulted in any increase in commercial boycotts masquerading as political ones. The Commission admits as much. See Br. 33. If the Court adopts a rule requiring inquiry into market power and motivation, there is even less cause for

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[14] See J.A. 157, 160 (Perotta testimony), 236-239 (Koskoff testimony, 263, 266-267 (Slaight testimony), 497-498 (Perotta investigational hearing), 504-505 (Addison investigational hearing), 553-560 (SCTLA document entitled *Representing The Poor: Criminal Injustice And Effective Representation*), 826-830 (SCTLA's prepared statement in support of legislation to increase reimbursement rates), 871 (Perotta testimony before D.C. Council Judiciary Committee), 941 (WTTG Television interview with Abe Blitzer).

[15] See, *e.g.*, *NOW*, *supra*; *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (M.D. Pa.), rev'd on other grounds, 634 F.2d 127 (3d Cir. 1980); *Claiborne Hardware*, 393 So. 2d at 1301.

concern that boycotts of the sort the antitrust laws were intended to prevent would be able to slip through the antitrust enforcement net. If the participants in a boycott have market power, they would not be entitled to *Noerr* immunity unless their predominant motive is a noncommercial one. If, on the other hand, they do not have market power, their actions should be of no concern to antitrust enforcement regardless of their motive because the boycott could not harm competition. See also pages 29-30 note 17, *infra*.

To be sure, it would be easier for the Commission to have at its disposal a rule excluding all boycotts from *Noerr* protection. But refusing to acknowledge a *per se* rule of exclusion will not result in any diminution of the Commission's authority to regulate *commercial* boycotts. The only result will be the protection of the small number of boycotts that are *political* in nature.

II. THE FIRST AMENDMENT BARS THE IMPOSITION OF ANTITRUST LIABILITY FOR THE TRIAL LAWYERS' BOYCOTT ABSENT PROOF THAT THE TRIAL LAWYERS POSSESSED MARKET POWER

Even if the *Noerr* doctrine does not apply to the Trial Lawyers' boycott, the judgment of the FTC cannot stand. As the court of appeals pointed out (Pet. App. 46a), the boycott had a substantial expressive element and therefore, under *United States* v. *O'Brien*, 391 U.S. 367 (1968), "the scope of [any regulation of that boycott] must be limited lest the incidental restriction of the participants' First Amendment freedoms be greater than is essential to further the [government's] interest in maintaining competition." The FTC's "condemnation without proof that the boycott could in fact be anticompetitive ignores the command of *O'Brien* that restrictions on activity protected by the First Amendment be '*no greater than is essential*' to preserve competition from the sclerotic effects of combination." Pet. App. 49a (emphasis in original).

The FTC attacks the court of appeals' common sense approach on two grounds. First, it argues (Br. 25-26) that the attempt to regulate the SCTLA's boycott does not even implicate the *O'Brien* test. Second, it contends (Br. 28-40) that even if *O'Brien* does apply, that standard does not require proof of market power as a prerequisite to the imposition of liability under the antitrust laws. The FTC is wrong on both scores.

A. The Boycott Constitutes Expressive Conduct Protected By The First Amendment

This Court has made clear that "when 'speech' and 'non-speech' elements are combined in the same course of conduct," that conduct is entitled to substantial protection under the First Amendment. *O'Brien*, 391 U.S. at 376-377. Although there can be no dispute that the SCTLA's boycott contained expressive elements, the FTC nonetheless contends that the *O'Brien* standard should not apply. The Commission argues (Br. 26)—without explanation—that the boycott was not protected speech despite its expressive content. The Commission further asserts (*ibid.*) that the *Noerr* doctrine and this Court's holding in *Claiborne Hardware* "give substantial protection to 'expressive' activity that might otherwise fall within the broad language of the antitrust laws" and that therefore "superimposing" the *O'Brien* standard onto these existing doctrines represents an overaccommodation of free speech interests. These arguments are wholly unpersuasive.

1. The suggestion that the SCTLA's boycott was not adequately expressive to qualify for any First Amendment protection at all is flatly at odds with the record and this Court's precedents. The Court only recently reiterated that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court has] asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who

viewed it.'" *Texas* v. *Johnson*, No. 88-155, slip op. 6 (June 21, 1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974)). There can be no question that the SCTLA's boycott meets that test. As the court of appeals said:

> the "factual context" of the SCTLA boycott suggests that the participants intended to communicate a message regarding the prevailing CJA rates and that this message was understood by others. [The SCTLA's members] actively courted media coverage of their "strike" by handing out press kits and organizing picket lines and rallies. The media responded with a number of newspaper articles and television stories that not only reported the boycott but also served to publicize [the SCTLA's] claims that the prevailing CJA rates were inadequate.

Pet. App. 47a (citation omitted).

Indeed, the decision in *Claiborne Hardware* is dispositive of this question. The boycott at issue in that case contained several elements—including speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, and publicizing the names of nonparticipants—that are by themselves entitled to First Amendment protection. 458 U.S. at 907-911. This Court held that the boycott—the agglomeration of all of these elements—could be regulated only if the requirements of *O'Brien* were met. *Id.* at 912. Because the SCTLA's boycott, like the one in *Claiborne Hardware*, was accompanied by speeches, nonviolent picketing, assembly, exhortations to others to join the boycott, rallies, dissemination of media kits, press interviews, and other First Amendment activity, applying the *O'Brien* standard here is not only appropriate, but required by "a straightforward application of controlling precedent." See *Thigpen* v. *Roberts*, 468 U.S. 27, 33 (1984).[16]

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[16] The Commission bases its contrary conclusion on the fact that some economic regulations have been upheld against First Amendment challenge even though those regulations limited speech in a manner similar to the one at issue in this case. See Br. 27-28 &

2. The FTC's second argument—that applying *O'Brien* to the SCTLA's boycott would overaccommodate the First Amendment interests at stake here—is also flawed. The Commission's apparent view that *Noerr* and *Claiborne Hardware* leave no room for *O'Brien* rests on a gross misunderstanding of the relationship between the principles set forth in the three decisions.

To begin with, the *Noerr* doctrine is rooted in the statute itself, not in the Constitution. 365 U.S. at 132 n.6, 136-138. While *Noerr* is designed to avoid a collision between the Sherman Act and the First Amendment—and the contours of *Noerr* immunity for that reason may often parallel the relevant constitutional rules—there is no reason that *Noerr* and *O'Brien* should not exist side by side. Indeed, the claim that *Noerr* shuts the door on *O'Brien* attributes to Congress the power to limit the applicability of the First Amendment. There is no basis for leaving some First Amendment activity—that which implicates the antitrust laws but does not qualify for *Noerr* immunity—without any constitutional protection whatever.

The Commission's argument with respect to *Claiborne Hardware* and *O'Brien* is also defective. These decisions do not prescribe alternative forms of analysis; rather, *Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*. Indeed, the Court in *Claiborne Hardware* cited *O'Brien* (see 458 U.S. at 912 & n.47) and concluded that the award of tort damages could not stand because it was not "tailored to

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n.21 (citing, *e.g.*, *International Longshoremen's Ass'n* v. *Allied International, Inc.*, 456 U.S. 212 (1982)). But the cases cited by the Commission do not suggest that the First Amendment was not implicated by these government regulations, only that the Amendment was not violated. The mere fact that different regulations adopted to further different government interests in different contexts were found not to violate the Constitution says nothing about how the First Amendment applies here. The same response applies to the Commission's rather far-fetched claim (Br. 38-39) that rejection of its position here would cast doubt on the validity of statutes barring strikes by government employees.

the consequences of [the] unlawful conduct" (458 U.S. at 926). Nothing in *Claiborne Hardware* indicates that the decision in that case was intended to describe fully the extent to which the First Amendment limits government regulation of boycotts. The Court there simply addressed one particular fact situation; it did not indicate that *O'Brien* has no effect on *other* sorts of boycott regulations. The analysis of those issues accordingly remains open for the future.

B. Because The Commission Did Not Show That The SCTLA Possessed Market Power, Its Regulation Of The SCTLA's Boycott Was Not Narrowly Tailored To The Government's Legitimate Interest In Antitrust Enforcement

The Commission's condemnation of the SCTLA's boycott was predicated upon the principle that boycotts constitute *per se* violations of the antitrust laws and that individuals and groups that participate in a boycott may therefore be penalized without regard to whether the boycott actually harmed competition, *i.e.*, whether the participants actually had market power and whether the boycott's anticompetitive aspects actually outweighed its procompetitive aspects. Pet. App. 48a. Because the SCTLA's boycott constituted expressive conduct, however, the FTC's application of the *per se* rule can survive First Amendment scrutiny only

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. There is no question that application of the *per se* rule to the Trial Lawyers' boycott passes muster under the first three prongs of the O'Brien test. The issue here is whether use of the *per se* rule in this context is "essential to the furtherance" of the government's concededly legitimate interest in antitrust enforcement.

In order to satisfy this prong of the *O'Brien* test, condemnation of expressive boycotts under the antitrust laws must be "narrowly tailored" to serve a substantial governmental interest and may "not 'burden substantially more speech than is necessary to further' " that interest. *Board of Trustees of the State Univ. of New York* v. *Fox*, No. 87-2013, slip op. 8 (June 29, 1989) (quoting *Ward* v. *Rock Against Racism*, No. 88-226, slip op. 16 (June 22, 1989)). As the court of appeals held (Pet. App. 48a-51a), application of the *per se* rule to expressive boycotts is impermissible under this standard.

The *per se* rule is simply a rule of administrative convenience. It "avoid[s] a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 15 n.25 (1984); see also *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). Because the *per se* rule establishes a conclusive presumption that all agreements falling within certain broad categories violate the antitrust laws, some agreements that do not actually restrain trade inevitably will be subject to punishment. See *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 344 (1982) ("[a]s in every rule of general application, the match between the presumed and the actual is imperfect"). In the run-of-the-mill concerted refusal to deal case, sacrificing accuracy "[f]or the sake of business certainty and litigation efficiency" (*ibid.*) is entirely acceptable. Regulations affecting only economic rights withstand constitutional scrutiny so long as they are rationally related to a permissible governmental interest. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938).

When First Amendment rights are involved, however, the standard is far stricter. "Where political expression or association is at issue, this Court has not tolerated

the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *In re Primus*, 436 U.S. 412, 434 (1978). A regulatory technique that restricts protected conduct "may extend only as far as the interest it serves." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 565 (1980).

Penalizing expressive boycotts without any indication that they have the potential to harm competition is not an approach narrowly tailored to serve the government's interest in prohibiting anticompetitive activity; it burdens substantially more speech than is necessary to further that interest. See *Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502 (1988) (a regulation "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). The government's interest can be accommodated fully—with a substantially reduced burden on First Amendment rights—by condemning only those expressive boycotts that actually have the potential to harm competition.

A boycott that lacks market power cannot harm competition. As the court of appeals explained, "the market power requirement generally serves to ensure that the antitrust laws do not interfere with business arrangements that could not actually exert any detrimental effect on competition." Pet. App. 48a; see also *Northwest Wholesale Stationers*, 472 U.S. at 296. The FTC did not inquire whether the SCTLA possessed market power and therefore did not determine whether the boycotters "could * * * actually [have] exert[ed] any detrimental effect on competition." Its condemnation of the boycott accordingly cannot be said to be narrowly tailored to serve the government's interest in antitrust enforcement.

The FTC does not dispute that the *per se* rule sometimes ensnares those who are powerless to harm competition and that individuals attempting to exercise their First Amendment rights might be among these hapless victims. Rather, it contends (Br. 31) that "efficiency in achieving important governmental purposes is itself a

substantial governmental interest" that justifies using the *per se* rule in all boycott cases even if that approach does trench more deeply on First Amendment rights. That argument misses the mark for several reasons.

The contention that efficiency is a substantial interest in its own right is incorrect. As this Court recently explained, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Fed'n of the Blind, Inc.*, 108 S. Ct. 2667, 2676 (1988); *cf. Bowen* v. *Roy*, 476 U.S. 693, 730-31 (1986) (O'Connor, J., concurring and dissenting) (administrative efficiency does not justify burden on First Amendment free exercise of religion). The obvious question is: efficiency in accomplishing what end? The weight to be accorded to a claim of efficiency depends on the cost—in terms of harm to the government's interest—of using an alternative that is less burdensome on First Amendment rights.

The cases upon which the FTC relies are not to the contrary. *United States* v. *Albertini*, 472 U.S. 675 (1985), merely holds that the military is entitled to use the most effective means available to prevent a *known* vandal from vandalizing military property and need not be relegated to less effective means that might better accommodate the vandal's First Amendment interests. *Abertini* does not hold that efficiency justifies incidental incursions on the First Amendment freedoms of individuals who have not been proven to pose any threat to military property. Similarly, *Clark* v. *Community for Creative Non-Violence ("CCNV")*, 468 U.S. 288 (1984), holds only that the Park Service need not make exceptions to its rule banning overnight camping in designated areas in order to accommodate the First Amendment interest of political protestors, who indisputably will do more damage to the grounds if they camp overnight than if they do not. CCNV does not hold that, in the name of convenience, the Park Service is entitled to enforce a broad regulation that bans some expressive conduct that has no harmful effect on park grounds.

This case is thus quite different from *Albertini* and *CCNV*. In those cases there was a proven danger to the government's interest and the methods chosen by the government to address that danger were more effective than alternatives that might better have accommodated First Amendment rights. Here, the FTC asks to be relieved of the burden of showing that there was any danger at all. Purely for efficiency's sake, it wants to penalize participants in expressive boycotts without showing that their activities threatened competition. Such an outcome is not required by *Albertini* and *CCNV* and is not consistent with this Court's repeated warning that the government may not sacrifice speech on the altar of efficiency.

Indeed, this Court has made clear that efficiency is "not sufficient [by itself] to justify the creation of *per se* rules. If it were otherwise, all of the antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law." *Sylvania*, 433 U.S. at 50 n.16. Accordingly, the Court has limited the *per se* rule to conduct that by its very nature lacks any redeeming virtue, refusing to subject various kinds of concerted activities to *per se* condemnation. See, *e.g.*, *Northwest Wholesale Stationers*, *supra*; *National Collegiate Athletic Ass'n* v. *Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); *BMI*, *supra*; *Sylvania*, *supra*. See also page 16 note 9, *supra*. The Court has been particularly emphatic in rejecting the notion that all concerted refusals to deal are subject to the *per se* rule, stating that courts need to show "care in application" of the rule lest concerted refusals to deal that are "characteristically [un]likely to result in predominantly anticompetitive effects" be unnecessarily penalized. *Northwest Wholesale Stationers*, 472 U.S. at 298, 295. Because efficiency cannot justify indiscriminately applying the *per se* rule to every kind of concerted activity, it cannot justify refusing to deviate from the *per se* rule where application of that rule conflicts with First Amendment values.

Finally, the Commission has substantially overstated the extent to which requiring proof of market power as a prerequisite to condemnation of expressive boycotts will affect antitrust enforcement. The market power requirement does not deprive the government of the ability to punish wrongdoing and does not keep the government from presenting relevant evidence that might be critical to its case. The FTC will lose no more than an "evidentiary shortcut." Pet. App. 50a. It can continue to enforce the antitrust laws as rigorously as it sees fit, but—at least where expressive boycotts are concerned—it must "prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns." Pet. App. 51a.

Such a requirement is not at all unusual. The government must demonstrate market power in any number of contexts, including, most obviously, monopolization and merger cases. Moreover, this Court has—as a matter solely of antitrust law—sometimes required a showing of market power as a prerequisite to application of the *per se* rule. See, *e.g.*, *Northwest Wholesale Stationers, supra; Jefferson Parish, supra; Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 (1958). Because the government already bears the burden of proving market power in a vast number of situations, the addition of a few more cases in which it does not enjoy the benefits of a conclusive presumption of competitive harm is hardly likely to prove disastrous.[17]

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[17] The FTC's concern that imposing a market power requirement in this case will virtually eliminate the *per se* rule in boycott cases generally (Br. 32-35, 42-43) is, as the court of appeals observed, "hysterical." Pet. App. 50a. As we have discussed (at 22), the SCTLA's boycott was pregnant with expressive content. We doubt that courts will have much difficulty distinguishing boycotts like the SCTLA's from run-of-the-mill competitor boycotts that contain no speech element at all (see *Klor's*, *supra*) or only a sham speech element. Moreover, to the extent that a boycott contains bona fide

III. THE FTC CANNOT CARRY ITS BURDEN OF PROVING MARKET POWER SIMPLY BY POINTING TO THE SUCCESS OF THE BOYCOTT

The FTC argues (Br. 40-45) that even if it must prove that the SCTLA possessed market power, the record contains sufficient evidence to establish that fact. It contends that the remand ordered by the court of appeals is unnecessary because the very fact that the D.C. government increased reimbursement rates proves that the SCTLA had market power. As the court of appeals pointed out, however (Pet. App. 53a-55a), this contention is far too facile. The very reason for inquiring into market power in the first place is to determine whether the success of the boycott was the result of political persuasion or economic coercion. Allowing the Commission to rely on the fact of success alone would defeat the entire purpose of the inquiry. Rather than distinguishing between political persuasion and economic power, the Commission's approach would allow the application of the *per se* rule to every successful boycott, even those wholly political in nature. This rather transparent attempt to circumvent the protections of *Noerr* and the First Amendment cannot succeed.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part, and the case remanded with directions to dismiss the complaint.

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expressive elements, we see no reason why the FTC should be entitled to condemn it absent a showing of market power. Hence, we do not view the FTC's parade of horribles (Br. 33-35) as being very horrible at all. If physicians boycott Medicaid patients as a means of expressing their disagreement with low reimbursement rates, the FTC can punish them so long as it proves that they have the power to do competitive harm. If they have no such power, then the FTC should not be entitled to condemn their expressive conduct.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

AUGUST 1, 1989